No. 97-1802

In The

Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 to 231

KEVIN C. BRAZILE*
Los Angeles County
Counsel's Office
648 Kenneth Hahn Hall
of Administration
500 West Temple Street
Los Angeles, California
90012
(213) 974-1943

Attorney for Petitioners

MICHAEL J. LIGHTFOOT*
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE, SADOWSKY,
MEDVENE & LEVINE
655 South Hope Street
Los Angeles, California
90017
(213) 622-4750

Attorney for Respondent

[*Counsel of Record]

Petition For Certiorari Filed May 4, 1998
Certiorari Granted October 5, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

RELEVANT DOCKET ENTRIES

U.S. District Court
Central District of California (Western Div.)

6/23/94	1	COMPLAINT (Summons(es) issued) Demand for jury trial (referred to Discovery Charles F. Eick) (am) [Entry date 06/24/94]
		* * *
8/5/94	6	NOTICE OF MOTION AND MOTION by defendant David Conn, defendant Carol Najera to dismiss memo of p's & a's in support of mot to dism; motion hearing set for 10:00 8/29/94 (bp) [Entry date 08/09/94]
		* * *
8/26/94	9	Opposition to defts' Conn & Najera's by plaintiff Paul L Gabbert to motion to dismiss [6-1] (es) [Entry date 09/07/94]
9/1/94	10	Reply memo of P/A in supprt by defendant David Conn, defendant Carol Najera to motion to dismiss [6-1] (es) [Entry date 09/13/94]
		* * *
9/30/94	14	ORDER by Judge Ronald S. Lew tht dft's Con & Najera's rule 12(b)(6) motion to dismiss is hereby DENIED as to subsection (d) of Pla's 2nd claim for violation of his 14theenth amd right to pracitce his profession. Dft's rule 12(b)(6) motion to dismiss is hereby GRANTED on the basis of qualified immunity as to pla's remaining claims for damages against dft's Conn &

Najera. Pla's clais for fourth amd violations, violations of the attorney-client privilege, violations of Cal. rule prof. conduct 2-100, & violations of Cal. penal code 1524 are DISMISSED WITH PREJUDICE [6-1] (ENT 10/3/93) mld cpys & ntc. (bp) [Entry date 10/03/94]

10/17/94 15 ANSWER by defendant David Conn, defendant Carol Najera to [1-1]; jury demand (bp) [Entry date 10/18/94]

* * *

1/9/95 22 NOTICE OF MOTION AND MOTION by plaintiff Paul L Gabbert for leave to file 1st A/C; Memo of p's & a's; Decl of Melissa N. Widdifield; Exbts; motion hearing set for 9:00 1/30/95 (mco) [Entry date 01/17/95]

* * *

1/13/95 25 OPPOSITION by defendant Leslie Zoeller motion for leave to file 1st A/C; Memo of p's & a's; Decl of Melissa N. Widdifield; Exbts [22-1] (mco) [Entry date 01/17/95]

1/17/95 26 Memo of P/A in opposition by defendant David Conn, defendant Carol Najera to motion for leave to file 1st A/C; Memo of p's & a's; Decl of Melissa N. Widdifield; Exbts [22-1] (es) [Entry date 01/19/95]

1/23/95 27 Joint Reply by plaintiff Paul L Gabbert to oppos to motion for leave to file 1st A/C [22-1] (jw) [Entry date 01/25/95]

* * *

2/8/95 28 ORDER by Judge Ronald S. Lew denying motion for leave to file 1st A/C; Memo of p's & a's; Decl of Melissa N. Widdifield; Exbts [22-1] (es) [Entry date 02/22/95]

* * *

8/31/95 38 NOTICE OF MOTION AND MOTION by defendant David Conn, defendant Carol Najera for summary judgment; memo of PA; separate stmt of uncontroverted material facts & Conclusions of law; decl & exhibits in support of mot; motion hearing set for 9:00 9/25/95 (we) [Entry date 09/11/95]

8/31/95 39 DECLARATIONS AND EXHIBITS by defendant David Conn, defendant Carol Najera in support of their motion for summary judgment [38-1] (we) [Entry date 09/11/95]

* * *

9/18/95 52 DECLARATIONS by plaintiff Paul L Gabbert in support of plf Gabbert's consolidated opposition to dfts motions for summary judgment [48-1], re [38-1]. (we) [Entry date 09/27/95]

9/18/95 53 CONSOLIDATED OPPOSITION by plaintiff Paul L Gabbert to defts motions for summary judgment [48-1], [38-1]. (we) [Entry date 09/27/95]

9/18/95 54 EXHIBITS (we) [Entry date 09/27/95]

* * *

9/22/95	59	REPLY memo of PA by defendant David Conn, defendant Carol Najera & decl of David Conn. (we) [Entry date 10/03/95]
9/28/95	57	STIPULATION and ORDER In its ord fld 9/30/94 as to dfts David Conn & Carol Najera, shall also be ordered dismissed against dft Elliot Oppenheim as if Oppenheim as if Oppenheim has joined in the mot to dism brough by dft dfts Conn & Najera. It is fur stipulated that any relief hereinafter obtained by plf by way of clarification or challenge to teh 9/30 ord sh also apply to this stipulated dismissal of those same clms against dft Oppenheim by Judge Ronald S. Lew terminating party Elliot Oppenheim (ENT 9/29/95), mld copy (pj) [Entry date 09/29/95]
10/2/95	62	MINUTES: granting motion for summary judgment [48-1], granting motion for summary judgment [38-1] by Judge Ronald S. Lew CR: roger may (kr) [Entry date 10/14/95]
10/3/95	60	JUDGMENT AND ORDER: by Judge Ronald S. Lew against plaintiff Paul L Gabbert granting dft Zoeller and Oppenheim's motion for summary judgment [48-1]; Jgm is entered in favor of dfts and agnst pla and pla to take nothing and the actn is dism on the merits as to these dfts and dfts may recover their costs. terminating case (ENT 10/5/95) MD JS-6 mld cpy (lk) [Entry date 10/05/95]
10/3/95	61	JUDGMENT AND ORDER: by Judge Ronald S. Lew against plaintiff Paul L

Gabbert granting dft Conn & Najera motion for summary judgment [38-1] (ENT 10/5/95) (lk) [Entry date 10/05/95]

* * *

10/19/95	65	NOTICE OF APPEAL by plaintiff to 9th C/A from Dist. Court ord ent on 10/5/95. (cc: Paul L. Gabbert: Kevin C. Brazile: Scott D. MacLatchie). Fee: Paid. (app)

MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT, VANDEVELDE
WOEHRLE & SADOWSKY
655 SOUTH HOPE STREET, 13TH FLOOR
LOS ANGELES, CALIFORNIA 90017
(213) 622-4750

Attorneys for Plaintiff
Paul L. Gabbert

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendents.	CASE NO. 94-4227 ABC (ex) COMPLAINT FOR VIOLATION OF CIVIL RIGHTS [42 U.S.C. § 1983] DEMAND FOR JURY TRIAL (Filed June 23, 1994)

Plaintiff Paul L. Gabbert alleges:

JURISDICTION AND VENUE

1. This action arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, as well as the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as hereinafter more fully appears.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

3. Declaratory and injunctive relief is authorized pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

4. The unlawful practices and conduct alleged herein were committed within the Central District of California. Therefore, venue lies in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

5. Plaintiff PAUL L. GABBERT is, and at all times mentioned herein was, a citizen of the United States and a resident of the County of Los Angeles. At all relevant times mentioned herein, plaintiff GABBERT was an attorney licensed to practice law in the State of California, and was the attorney of record for Tracy L. Baker. Plaintiff GABBERT brings the instant action as an individual asserting his personal constitutional rights and in his representative and fiduciary capacity as an attorney asserting the privacy and property interests of Ms. Baker.

6. Defendant DAVID CONN is, and at all relevant times mentioned herein was, a Deputy District Attorney employed by the County of Los Angeles. The acts attributed to him herein were performed in his investigative capacity. Defendant CONN is named herein in his individual and official capacities.

7. Defendant CAROL NAJERA is, and at all relevant times mentioned herein was, a Deputy District Attorney employed by the County of Los Angeles. The

acts attributed to her herein were performed in her investigative capacity. Defendant NAJERA is named herein in her individual and official capacities.

8. Defendant ELLIOT OPPENHEIM is an attorney in the State of California. On January 1, 1994 defendant OPPENHEIM's status with the California State Bar became "inactive." At all relevant times mentioned herein defendant OPPENHEIM was a special master employed by County of Los Angeles pursuant to California Penal Code § 1524. Defendant OPPENHEIM is sued herein in his individual and official capacities.

9. Defendant LESLIE ZOELLER is, and at all relevant times mentioned herein was, a detective employed by the Beverly Hills Police Department. Defendant ZOELLER is named herein in his individual and official capacities.

10. Plaintiff is informed and believes, and upon that basis alleges, that at all times herein mentioned, defendants CONN, NAJERA, OPPENHEIM, and ZOELLER, and each of them, was the agent of the remaining defendants, and in doing the things hereinafter alleged, acted in concert with said defendants and within the scope of such agency.

11. Plaintiff GABBERT is ignorant of the true names and capacities of DOES I through X and, therefore, sues such defendants by fictitious names. Plaintiff will seek leave to amend this Complaint to allege their true names and capacities when they are ascertained. Plaintiff is informed and believes, and on that basis alleges, that defendants DOES I through V were, at all relevant times mentioned herein, agents or employees of the County of

Los Angeles and acted in concert with, and as agents of, defendants CONN, NAJERA, and OPPENHEIM and each of them.

12. Plaintiff is informed and believes, and on that basis alleges, that at all relevant times mentioned herein, DOES VI through X were agents or employees of the City of Beverly Hills and/or the Beverly Hills Police Department, and acted in concert with, and as agents of defendants CONN, NAJERA, OPPENHEIM, and ZOELLER and each of them.

13. The individual defendants and defendants DOES I through X, and each of them, acted as alleged herein, not merely as individuals, but also under color, authority, and pretense of the statutes, ordinances, regulations, customs and usages of the State of California, the County of Los Angeles, the City of Beverly Hills, and under the authority of their offices as alleged herein.

FACTS

14. Plaintiff GABBERT is an experienced criminal defense lawyer who has practiced law in the Los Angeles area since approximately 1977. He is an active member in good standing of the California State Bar.

15. On or about February 11, 1994, Tracy L. Baker, one of the witnesses in the case of *People v. Lyle Menendez*, retained plaintiff GABBERT as her attorney to provide her with legal advice and representation in connection with an investigation of Ms. Baker by the Los Angeles County District Attorney regarding her testimony in the *Menendez* matter.

16. Shortly after February 11, 1994, plaintiff GABBERT, as counsel for Ms. Baker, was contacted by telephone by defendant LESLIE ZOELLER, a detective with defendant Beverly Hills Police Department assigned to investigate the *Menendez* matter. Plaintiff GABBERT stated that he represented Ms. Baker. Plaintiff GABBERT understood from his conversation with defendant ZOELLER that he, defendant ZOELLER, and the District Attorney's Office, sought Ms. Baker's cooperation with the government in the anticipated re-trial of Mr. Menendez. Between February 11, 1994 and March 17, 1994, plaintiff GABBERT, as counsel for Ms. Baker, received additional telephone calls from defendant ZOELLER regarding the matter.

17. Between February 11, 1994, and March 15, 1994, plaintiff GABBERT, as counsel for Ms. Baker, also received telephone calls from defendant CONN. Plaintiff GABBERT communicated to defendant CONN the fact that he represented Ms. Baker. During one of the telephone conversations, defendant CONN told plaintiff GABBERT that Ms. Baker was a "target" of a grand jury investigation. Defendant CONN inquired whether Ms. Baker would agree to cooperate in the government's investigation in the *Menendez* matter. Plaintiff GABBERT told defendant CONN that he was unable at that time to respond to the inquiry. Defendant CONN requested that plaintiff GABBERT make Ms. Baker available for service of a subpoena commanding her to testify before the grand jury. Plaintiff GABBERT agreed. It was further agreed that defendant ZOELLER would serve the grand jury subpoena at plaintiff GABBERT's law office on March 17, 1994 at 12 noon.

18. In approximately the third week of February 1994, subsequent to learning that Ms. Baker was represented by plaintiff GABBERT, defendant ZOELLER appeared unannounced, with another Beverly Hills Police Department police officer, Stephanie Miller, at the home of Ms. Baker at approximately 8:30 p.m. Despite his knowledge that Ms. Baker was represented by counsel, and that counsel was not present, defendant ZOELLER attempted to question Ms. Baker as to the existence of a letter purportedly written by Mr. Menendez to Ms. Baker.

19. On Thursday, March 17, 1994, defendant ZOELLER appeared at plaintiff GABBERT's law office to serve the grand jury subpoena directed to Ms. Baker. Defendant ZOELLER advised plaintiff GABBERT of a continued interest in Ms. Baker's "cooperation" with law enforcement authorities.

20. The subpoena, attached hereto as Exhibit A, in addition to commanding Ms. Baker's appearance before the grand jury on Monday, March 21, 1994 at 8:30 a.m., also ordered her to produce at that time any correspondence from Lyle Menendez to her. Plaintiff GABBERT recognized that the subpoena's command to produce documents implicated and potentially impinged upon his client's constitutional right against compulsory self-incrimination. As the attorney for Ms. Baker, plaintiff GABBERT prepared a motion to quash the subpoena which he intended to file on Friday, March 18, 1994.

21. On Friday morning, March 18, 1994, plaintiff GABBERT telephoned defendant CONN and advised him of the constitutional basis for the motion to quash the

subpoena to Ms. Baker. Plaintiff GABBERT asked defendant CONN to continue Ms. Baker's grand jury appearance for one week, so that the motion to quash the subpoena could be fully and appropriately litigated prior to Ms. Baker's appearance before the grand jury. Defendant CONN refused.

22. Shortly thereafter, plaintiff GABBERT again telephoned defendant CONN, this time to request that he stipulate to the issuance of an order shortening time so that the motion to quash could be heard prior to Ms. Baker's grand jury appearance. Defendant CONN refused this request as well.

23. On the afternoon of Friday, March 18, 1994, plaintiff GABBERT attempted to have the motion to quash filed in the Los Angeles Superior Court. Judge James Bascue denied plaintiff GABBERT's *ex parte* application for an order shortening time and declined to accept the motion to quash for filing.

24. On Friday, March 18, 1994, shortly after plaintiff GABBERT's efforts to have his motion to quash filed, defendants CONN, NAJERA, ZOELLER, and Officer Stephanie Miller, appeared at Ms. Baker's home with a search warrant for all correspondence to or from Lyle Menendez and any other evidence which would establish a relationship between Tracy Baker and Lyle Menendez. A copy of this search warrant is attached hereto as Exhibit B.

25. Defendants CONN, NAJERA and ZOELLER and Officer Stephanie Miller proceeded to search Ms. Baker's home for approximately one and one-half hours. During

the course of the search, defendants CONN, NAJERA, ZOELLER and Officer Miller seized, among other things:

a) two shopping bags full of letters written from private citizens to Lyle Menendez;

b) six magazines and newspapers containing articles about the *Menendez* case;

c) correspondence from another attorney to Tracy Baker, including the attorney's notes of her interview with Ms. Baker;

d) photographs of Lyle Menendez; and

e) a notebook of Ms. Baker's containing names and addresses.

In addition, defendant CONN gained access to Ms. Baker's computer and viewed information stored therein.

26. Before the search began, Ms. Baker attempted to contact her attorney, plaintiff GABBERT, by telephone, but was unsuccessful. Knowing that Ms. Baker was a target of their criminal investigation and that she was represented by counsel, and knowing further that she desired to speak with her attorney, but was unable to, defendants CONN, NAJERA and ZOELLER, nonetheless sought to elicit statements from Ms. Baker as to whether she was in possession of correspondence from Lyle Menendez. Defendant CONN also asked Ms. Baker several questions about her relationship with plaintiff GABBERT.

27. California Rule of Professional Conduct 2-100 provides that a lawyer shall not "[c]ommunicate directly or indirectly about the subject of the representation with a party the members know to be represented by another lawyer in the matter, unless the member has the prior

consent of the lawyer representing such other party or is authorized to do so by law."

28. On Monday morning, March 21, 1994, plaintiff GABBERT and Ms. Baker checked in with the grand jury bailiff on the 13th floor of the Los Angeles County Criminal Courts Building at approximately 8:30 a.m. Plaintiff GABBERT had with him a briefcase and a separate paper accordion file. The accordion file contained the pleadings relating to the motion to quash which plaintiff GABBERT had attempted to have filed on the previous Friday afternoon, as well as the file he kept regarding his representation of Ms. Baker, which contained confidential materials protected by the attorney-client privilege. Plaintiff GABBERT's briefcase also contained the following items: 1) two additional attorney-client files, 2) a calendar with plaintiff GABBERT's handwritten notes, including a list of past and present client names, 3) a leather pocketbook/wallet, containing a checkbook and credit cards, and other miscellaneous cards and papers, 4) a dictaphone, 5) an eye-glass case, 6) a tablet of paper with plaintiff GABBERT's handwritten notes, 7) a letter written to a friend by a third party, and 8) newspapers.

29. Between 8:30 and 9:00 a.m., defendants CONN and NAJERA arrived at the grand jury area. Approaching plaintiff GABBERT and pointing to the accordion file, defendant CONN said something to the effect that he saw that GABBERT had brought everything with him. Plaintiff GABBERT replied that he had with him the papers which the Court would not file on Friday. Plaintiff GABBERT then showed defendants CONN and NAJERA Judge Bascue's order denying the *ex parte* application for an order shortening time. Defendant CONN's response,

referring to Ms. Baker, was that she was still obliged to comply with the grand jury subpoena.

30. Defendant CONN then initiated a discussion concerning a possible grant of immunity to Ms. Baker in exchange for her testimony before the grand jury. Defendant CONN suggested that they (defendants CONN and NAJERA, plaintiff GABBERT and Ms. Baker) go to defendant CONN's office to discuss the matter further.

31. Defendant CONN and plaintiff GABBERT discussed a potential grant of "use" immunity for Ms. Baker. Defendant CONN agreed to have a draft "immunity letter" prepared.

32. Before plaintiff GABBERT and Ms. Baker left defendant CONN's office to return to the grand jury area on the 13th floor, defendant CONN asked plaintiff GABBERT, in Ms. Baker's presence, whether GABBERT would "surrender her" if she were indicted or whether it would be necessary to travel to Orange County to effect her arrest. Plaintiff Gabbert advised defendant CONN that if "surrender" the situation arose, he would agree to Ms. Baker.

33. Plaintiff GABBERT discussed the immunity issue further with Ms. Baker. When defendants CONN and NAJERA returned to the hallway outside the grand jury area, plaintiff GABBERT asked defendant CONN if he had the immunity letter. Defendant CONN indicated that his secretary was still typing it.

34. Moments later, the following events occurred within a short period of time:

a) Ms. Baker was called to testify before the grand jury. She said she needed to visit the restroom first. While plaintiff GABBERT was waiting for Ms. Baker, defendant NAJERA engaged him in conversation. Meanwhile, defendant CONN had entered the grand jury room.

b) As Ms. Baker returned from the restroom to begin testifying before the grand jury, defendant ZOELLER approached plaintiff GABBERT and served him with a search warrant for the persons of plaintiff GABBERT and Ms. Baker, as well as for the briefcase and packages of plaintiff GABBERT. The warrant sought correspondence between Ms. Baker and Lyle Menendez. A copy of this search warrant is attached hereto as Exhibit C. The warrant specifically stated that the search of plaintiff GABBERT was to be conducted through "special master" defendant ELLIOT OPPENHEIM.

c) At this point, defendant CONN exited the grand jury room to the foyer area where plaintiff GABBERT, Ms. Baker and defendants NAJERA and ZOELLER were standing. Defendant CONN then introduced plaintiff GABBERT to defendant ELLIOT OPPENHEIM, an attorney designated in the warrant as the special master, purportedly pursuant to California Penal Code § 1524, who would search plaintiff GABBERT's person and belongings.

35. Pursuant to the terms of California Penal Code § 1524(c)(1), at the time of "service of the warrant, the special master shall inform the party served of the specific items being sought and [ ] the party shall have the opportunity to provide the items requested." Section

1524(c)(2) provides that, if an attorney served with a warrant states that an "item or items should not be disclosed, they shall be sealed by the special master and taken to court for a hearing." Section 1524(e) further provides that a special master may permit the party serving the warrant to accompany the special master as he or she conducts the search. However, that party "shall not participate in the search nor shall he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served."

36. At his request, plaintiff GABBERT was then taken to a private room by defendant OPPENHEIM. Plaintiff GABBERT's client, Ms. Baker, was left waiting with defendants CONN and NAJERA in a conference room adjacent to the grand jury room.

37. As defendant OPPENHEIM began the search, Ms. Baker was called to appear before the grand jury. Ms. Baker was frightened and confused by the scene unfolding before her and asked to consult with Mr. GABBERT. Plaintiff GABBERT was unable to advise or assist Ms. Baker because he was in the process of being searched by defendant OPPENHEIM. Plaintiff GABBERT stated that Ms. Baker's appearance needed to be delayed until the search was completed. Nonetheless, Ms. Baker was ordered to enter the grand jury room.

38. Defendant OPPENHEIM began the search by going through the paper accordion file which contained plaintiff GABBERT's attorney-client correspondence and document file as to Ms. Baker (hereinafter the "Baker file") and the pleadings in connection with the motion to

quash the grand jury subpoena. The Baker file contained attorney-client and work-product privileged material, including plaintiff GABBERT's handwritten notes of his interviews with Ms. Baker.

39. Throughout the search, plaintiff GABBERT voiced objections to defendant OPPENHEIM's search of his belongings on the grounds that the files contained attorney-client and work-product privileged information. Plaintiff GABBERT requested that defendant OPPENHEIM not view the privileged materials. During the course of the search, plaintiff GABBERT advised defendant OPPENHEIM that the only document he had with him that was potentially within the scope of the search warrant was a xeroxed copy of two pages of a three page letter purportedly written by Lyle Menendez to Ms. Baker. Plaintiff GABBERT gave this document to defendant OPPENHEIM. This document was never returned to plaintiff GABBERT. In the search warrant return, defendant ZOELLER stated that no documents were seized from plaintiff GABBERT.

40. After obtaining the only document in plaintiff GABBERT's possession arguably within the scope of the warrant, defendant OPPENHEIM continued to search through plaintiff GABBERT's accordion file and its contents. Defendant OPPENHEIM read the entire Baker file and requested permission to make a cop of plaintiff GABBERT's client interview notes. Plaintiff GABBERT refused that request.

41. After completing his search of the accordion file, defendant OPPENHEIM proceeded to search plaintiff

GABBERT's briefcase which contained, among other things, the following items:

a) two of plaintiff GABBERT's client files (other than those relating to Tracy Baker) containing privileged attorney-client and work-product materials;

b) plaintiff GABBERT's calendar, which contained extensive handwritten entries and notes, including a list of past and present client names, addresses and telephone numbers;

c) a leather pocketbook/wallet;

d) a dictaphone;

e) an eye-glass case; and

f) a tablet of paper containing, among other things, a list of "things to do" and a list of client names and corresponding information which revealed the client's billing status.

42. Defendant OPPENHEIM searched each and every item in plaintiff GABBERT's briefcase, including his calendar and the items in his pocketbook/wallet. Plaintiff GABBERT informed defendant OPPENHEIM that the two client files contained privileged communications. Defendant OPPENHEIM read the contents of each file over plaintiff GABBERT's objection. In addition, defendant OPPENHEIM questioned plaintiff GABBERT about his fee arrangement with Ms. Baker and about his home address. Defendant OPPENHEIM commented on a sheet of paper he found in plaintiff GABBERT's calendar which bore notes regarding a woman's clothing sizes; he made a remark about the apparent size of the woman's brassiere. Defendant OPPENHEIM also read the contents

of a letter he discovered, which was addressed to a friend of plaintiff GABBERT.

43. While defendant OPPENHEIM's search of plaintiff GABBERT's files and other personal belongings was under way, Ms. Baker was being interrogated before the grand jury by defendant CONN. One line of inquiry related directly to a subject matter which plaintiff GABBERT had earlier informed defendant CONN implicated Ms. Baker's Fifth Amendment right against self-incrimination. Before answering the question, Ms. Baker asked, and was permitted by the foreperson, to be excused from the grand jury in order to consult with her attorney. Because plaintiff GABBERT was in a separate room being searched by defendant OPPENHEIM, he was unable to consult with his client at that time. It was only after defendant OPPENHEIM completed his search that plaintiff GABBERT was able to listen to, speak with, and advise his client in confidence.

44. Shortly after Ms. Baker left the grand jury room, defendants CONN and NAJERA joined defendant OPPENHEIM and plaintiff GABBERT in the conference room adjacent to the grand jury room. Defendant CONN told plaintiff GABBERT that defendant OPPENHEIM had determined that nothing in the briefcase and files was privileged and that defendant ZOELLER would conduct another search of plaintiff GABBERT and the files and effects in his possession. Plaintiff GABBERT asked if the search could be momentarily delayed until his attorneys arrived. The request was denied.

45. Defendant ZOELLER proceeded to search plaintiff GABBERT's files and belongings a second time.

Defendants CONN and NAJERA observed the search and viewed the contents of the Baker file.

46. Midway through the search conducted by defendant ZOELLER, defendant CONN departed. Eventually defendants CONN and NAJERA returned to the grand jury room. After the second search was completed, Ms. Baker was commanded to return to the grand jury. The questioning of Ms. Baker then resumed.

47. Shortly thereafter, the parties proceeded to Department 110 of the Los Angeles County Superior Court for an *in camera* hearing relating to Tracy Baker's grand jury appearance. Defendant CONN advised plaintiff GABBERT that a warrant for his office had been obtained. A copy of this search warrant is attached hereto as Exhibit D.

48. The hearing in Department 110 was scheduled to take place at approximately 11:30 a.m, Plaintiff GABBERT requested that the hearing be briefly delayed until his attorneys arrived. Defendants CONN and NAJERA denied this request. While waiting to enter Dept. 110, plaintiff GABBERT and defendant OPPENHEIM conversed in the hallway. Plaintiff GABBERT asked defendant OPPENHEIM the basis for his determination that the attorney-client interview notes in plaintiff GABBERT's files were not privileged. Defendant OPPENHEIM responded to the effect that the documents themselves were neither stamped nor marked as "privileged."

FIRST CLAIM FOR RELIEF

(42 U.S.C. § 1983)

(Fourth Amendment Violation)

ALLEGATIONS AS TO ALL DEFENDANTS

49. Plaintiff realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 through 48 inclusive, of this Complaint.

50. In doing and causing the aforesaid acts, the defendants, and each of them, acting under color of the statutes, regulations and ordinances of the State of California, the County of Los Angeles and the City of Beverly Hills, negligently, recklessly, intentionally, and in bad faith deprived plaintiff GABBERT of the rights, privileges, and immunities secured and guaranteed to him by the Constitution and laws of the United States, in that defendants;

(a) deprived plaintiff of his right to be free from unreasonable searches and seizures, as secured by the Fourth and Fourteenth Amendments by, *inter alia* searching and seizing his briefcase, files, and possessions without a valid or lawful warrant, without probable cause, and with a warrant that had been issued on the basis of an affidavit which included material misstatements and omissions of fact which had been intentionally or recklessly made and omitted by the affiant;

(b) deprived plaintiff of his right to be free from unreasonable searches and seizures, as secured by the Fourth and Fourteenth

Amendments, in that the searches and seizures of plaintiff GABBERT's briefcase and files were unreasonably broad and general in their execution; and

(c) deprived plaintiff of his right to be free from unreasonable searches and seizures, as secured by the Fourth and Fourteenth Amendments, by wilfully failing to comply with the statutory mandates of California Penal Code § 1524.

51. The aforementioned rights were clearly established at the time of the violations alleged, and defendants knew or reasonably should have known of plaintiff's rights and that their conduct amounted to violations of those rights.

52. By reason of and as a direct and proximate result of the aforementioned acts of the defendants, Does I through X, and each of them, plaintiff suffered and continues to suffer injury, damage, and loss including, but not limited to the following: public degradation and obloquy and injury to his reputation, as well as loss of past, present and future earnings, in an amount which will be proven at trial. In addition, plaintiff suffered and will continue to suffer from the chilling effect the defendants' conduct has had on his effective representation of Ms. Baker and other current and future clients similarly situated.

53. The aforesaid acts of the individual defendants and DOES 1 through X, and each of them were willful, wanton malicious and oppressive, thereby warranting the imposition of punitive damages.

54. Plaintiff also seeks an order from this Court enjoining defendants, and each of them, in their official capacities, from unreasonably searching and seizing him or his effects in the future, in violation of his rights pursuant to the Constitution, 42 U.S.C. § 1983, California Penal Code § 1524, and other state statutory and common law as alleged. Plaintiff has no adequate remedy at law to prevent such future harm.

55. An actual controversy has arisen between plaintiff and defendants, and each of them, relating to whether the defendants' acts constitute a violation of plaintiff's rights under the Constitution, 42 U.S.C. § 1983, California Penal Code § 1524 and state statutory and common law. Declaratory relief is necessary to resolve this controversy and to establish the rights of the parties hereto.

SECOND CLAIM FOR RELIEF

(42 U.S.C. § 1983)

(Fourteenth Amendment Violation)

ALLEGATIONS AS TO ALL DEFENDANTS

56. Plaintiff realleges and incorporates herein by reference each and every allegation set forth in paragraphs I through 48, inclusive, of this Complaint.

57. In doing and causing the aforesaid acts, the defendants, and each of them, acting under color of the statutes, regulations and ordinances of the State of California, the County of Los Angeles, and the City of Beverly Hills, further negligently, recklessly, intentionally and in bad-faith deprived plaintiff GABBERT of the rights, privileges and immunities secured and guaranteed

to him by the Constitution and laws of the United States in that defendants, and each of them, engaged in an arbitrary, capricious and unreasonable course of conduct which constituted an abuse of governmental authority and violated plaintiff's substantive due process rights under the Fourteenth Amendment as follows:

a) Defendants, course of conduct, including in particular the search of plaintiff GABBERT'S briefcase and files at the time of his client's grand jury appearance, constituted an egregious governmental interference with and intrusion into plaintiff GABBERT'S relationship with his client, and deprived plaintiff of his ability effectively to represent, assist and counsel his client, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Sixth and Fourteenth Amendments; and

b)- By reason of the defendants' interference with and intrusion into plaintiff GABBERT'S relationship with his client, plaintiff GABBERT was deprived of his ability to effectively assert his client's constitutional rights against self-incrimination all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Fifth and Fourteenth Amendments; and

c) The searches and seizures of plaintiff GABBERT unreasonably and unjustifiably intruded upon the privacy interests of the plaintiff and his clients, including Tracy L. Baker, in privileged materials, information and attorney-client communications, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected under the

Fourth, Fifth, Sixth and Fourteenth Amendments; and

d) Defendants' course of conduct, including the searches and seizures of plaintiff GABBERT, constituted an arbitrary and capricious interference with plaintiff's right to practice his profession as an attorney, i.e., to assert and protect the rights and interests of his client, Ms. Baker, all in derogation of rights and interests protected by the Sixth and Fourteenth Amendments; and

e) Defendants' course of conduct, and in particular the interrogation of Ms. Baker without the presence of her counsel, constituted a violation of California Rule of Professional Conduct 2-100 in that the defendants, knowing Ms. Baker was represented by plaintiff, intentionally communicated with her regarding the subject matter of plaintiff's representation of Ms. Baker, thereby depriving plaintiff of his ability effectively to represent, assist and counsel his client, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Sixth and Fourteenth Amendments; and

f) Defendants' course of conduct, and in particular the failure to comply with the mandates of California Penal Code § 1524, deprived plaintiff of his ability effectively to assert the attorney-client and work-product privileges on behalf of Ms. Baker, all in derogation of duties, obligations, rights and interests of plaintiff GABBERT and his client protected by the Fifth, Sixth and Fourteenth Amendments.

58. The aforementioned rights were clearly established at the time of the violations alleged, and defendants knew or reasonably should have known of plaintiff's rights and that their conduct amounted to violations of those rights.

59. By reason of and as a direct and proximate result of the aforementioned acts of the defendants, and each of them, plaintiff suffered and continues to suffer injury, damage, and loss including, but not limited to the following: public degradation and obloquy and injury to his reputation, and loss of past, present and future earnings, in an amount which will be proven at trial. In addition, plaintiff has suffered and will continue to suffer from the chilling effect the defendants' conduct has had on his effective representation of Ms. Baker and other current and future clients similarly situated.

60. Plaintiff also seeks an order from this Court enjoining defendants, and each of them, in their official capacities from disclosing or publishing in any manner any privileged or confidential information they may have learned in the course of their unlawful conduct. While monetary damages may compensate plaintiff for past harm caused by defendants, plaintiff has no adequate remedy at law to prevent such future harm.

61. An actual controversy has arisen between plaintiff and defendants, and each of them, relating to whether the defendants' acts and course of conduct constitute a violation of plaintiff's rights under the Constitution, 42 U.S.C. § 1983, California Rule of Professional Conduct 2-100, California Penal Code § 1524 and state statutory and common law. Declaratory relief is necessary to

resolve this controversy and to establish the rights of the parties hereto.

62. The aforesaid acts of the individual defendants were willful, wanton, malicious and oppressive thereby warranting the imposition of punitive damages.

WHEREFORE plaintiff prays for judgment and the following relief:

UNDER THE FIRST CLAIM FOR RELIEF

1. General and special damages according to proof;

2. Punitive damages against the individual defendants an amount sufficient to deter similar future conduct;

3. Injunctive relief against all defendants in their individual and representative capacities for the purpose of preventing any of the alleged conduct from occurring in the future.

4. A declaration that the actions of the defendants violated plaintiff's rights against unreasonable searches and seizures.

5. Costs and reasonable attorney's fees against all defendants pursuant to 42 U.S.C. § 1988; and

6. Any further relief the Court deems just and proper.

UNDER SECOND CLAIM FOR RELIEF

1. General and special damages according to proof;

2. Punitive damages against the individual defendants in their individual and representative capacities for the purpose of preventing any of the alleged conduct from occurring in the future.

3. Injunctive relief against all defendants in their individual and representative capacities for the purpose of preventing any of the alleged conduct from occurring in the future.

4. A declaration that the actions of the defendants violated plaintiff's Fifth and Sixth Amendment rights.

5. Costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

6. Any further relief the Court deems just and proper.

DATED: June 23, 1994

Respectfully submitted,

MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT LIGHTFOOT,
VANDEVELDE WOEHRLE
& SADOWSKY

/s/ Michael J. Lightfoot
By: MICHAEL J. LIGHTFOOT
Attorneys for Plaintiff
Paul L. Gabbert

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial.

DATED: June 23, 1994

Respectfully submitted,

MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE WOEHRLE
& SADOWSKY

/s/ Michael J. Lightfoot
By: MICHAEL J. LIGHTFOOT
Attorneys for Plaintiff
Paul L. Gabbert

EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

The people of the State of California:

To TRACI BAKER
c/o INVESTIGATING OFFICER

YOUR [sic] ARE COMMANDED to appear before the Grand Jury of the County of Los Angeles, State of California, at 13-303 Criminal Courts building, 210 W. Temple Street, City of Los Angeles, County and State aforesaid, on the 21st day of MARCH, 1994 at 8:30 A.m., as witness in an investigation pending before said Grant Jury, and bring with you the following documents: Any correspondence from Lyle Menendez.

Given under my hand this 16th day of MARCH, 1994

GIL GARCETTI, District Attorney
For the County of Los Angeles,
State of California

By /s/ David Conn
DAVID CONN, DDA Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SUBPOENA
FOR THE
GRAND JURY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

CRIMINAL INVESTIGATION

Defendant.

GIL GARCETTI
District Attorney of Los Angeles County
Los Angeles, California 90012

SHERIFF'S OFFICE)
) ss.
LOS ANGELES COUNTY)

I hereby certify that I served the within subpoena on the following named persons at the time and place herein stated in the County of Los Angeles, they being witnesses therein named, by showing the original to said witness _____ personally, and informing _____the contents thereof, to wit:

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

_____at _____ on the ___ day of _____ 19___

And further, that after due and diligent search I have been unable to find or make service of said subpoena in said County of Los Angeles on the following persons therein named as witnesses, to wit:

_____

_____

_____

_____

_____

SHERMAN BLOCK
Sheriff of Los Angeles County
By /s/ _____
Deputy Sheriff.

Dated _____

_____

EXHIBIT B

Search Warrant No. [ ]

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SEARCH WARRANT

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF, by affidavit, having been made before me by LESLIE ZOELLER, No. 99980 (name of affiant) that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

____ was stolen or embezzled

____ was used as the means of committing a felony

____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

XX is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED to SEARCH

29041 Aloma Avenue, Apartment 110, Laguna Niguel, further described as a two-story apartment complex, light stucco with dark trim. Apartment No. 110 is a downstairs apartment in approixmately [sic] the center of the complex and on the west side. The number "110" is written

on the door. Also all storage compartments, garages and trash receptacles for Apartment No. 110.

for the following property:

all letters and other correspondence to or from Lyle Menendez and any other documentary evidence or photographs of Lyle Menendez which would show an association with, or relationship between, Lyle Menendez and Tracy Baker.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 18th day of MARCH, 1994 at 4:36 p.m.

/s/ _____
Signature of Magistrate

Judge of the Superior (~~Superior/Municipal~~) Court Los Angeles (Judicial District)

NIGHTTIME SERVICE ENDORSEMENT*

GOOD CAUSE HAVING BEEN SHOWN BY AFFIDAVIT, THIS WARRANT CAN BE SERVED AT ANY TIME OF THE DAY OR NIGHT.

n/a
Endorsement of Magistrate
for Nighttime Service

*Unless endorsed for nighttime service, this warrant can be served only between 7:00 a.m. and 10:00 p.m.

Search Warrant No. [ ]

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

AFFIDAVIT FOR SEARCH WARRANT

LESLIE ZOELLER, No. 99980 (name of affiant), being sworn, says that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

____ was stolen or embezzled

____ was used as the means of committing a felony

____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

XX is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH

29041 Aloma Avenue, Apartment 110, Laguna Niguel, further described as a two-story apartment complex, light stucco with dark trim. Apartment No. 110 is a downstairs apartment in approximately the center of the complex and on the west side. The number "110" is written on the

door. Also all storage compartments, garages and trash receptacles for Apartment No. 110.

for the following property:

all letters and other correspondence to or from Lyle Menendez and any other documentary evidence or photographs of Lyle Menendez which would show an association with, or relationship between, Lyle Menendez and Tracy Baker.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a search warrant be issued for the seizure of said property or any part thereof, at any time of the day **OR NIGHT***, good cause therefore having been shown.

/s/ Leslie Zoeller
/s/ Leslie Zoeller
Signature of Affiant

Subscribed and sworn to
before me this 18th day of
MARCH, 1994.

/s/ _____
Signature of Magistrate

Judge of the Superior (Superior/~~Municipal~~) Court Los Angeles (Judicial District)

Prepared with the assistance of, or reviewed by:

_____
Deputy District Attorney

*Strike **OR NIGHT** if not applicable.

AFFIDAVIT

I, LESLIE ZOELLER, No. 99980, have been employed by the City of Beverly Hills Police Department as a police officer for 20 years 11 months. I have been a detective for 15 years 11 months, currently assigned to Robbery/ Homicide Division. I am the Investigating Officer for the murders of Jose and Mary ("Kitty") Menendez which occurred on August 20, 1989 at 722 North Elm Drive, Beverly Hills, California.

Your affiant has interviewed in excess of 150 people in regard to the Menendez double homicide and has learned the following:

On August 20, 1989 your affiant responded to 722 North Elm Drive, Beverly Hills, and observed victims Jose and "Kitty" Menendez dead. Your affiant attended the autopsies of both decedents in which the cause of death for both was determined to be multiple shotgun blasts. Evidence observed by your affiant at the time of the crime leads to the conclusion that one or more 12 gauge shotguns were used, although no weapons have yet been recovered and no expended shells were recovered at the scene.

Sergeant Thomas Edmonds of the Beverly Hills Police Department interviewed the decedents' sons, Joseph (Lyle) and Erik Menendez, shortly after they called the police at 11:47 p.m. on August 20. Lyle and Erik indicated that on August 20, they returned home from the movies, they found their parents dead and immediately called the police.

Other evidence subsequently uncovered during the course of the investigation revealed that Erik and Lyle Menendez were involved in the murder of their parents.

Lyle Menendez was arrested for the murders of his parents on March 8, 1990. Erik Menendez surrendered to police and was arrested on March 11, 1990.

The defendants remained in custody up until they were indicted by the Los Angeles Grand Jury on December 7, 1992, an indictment which superseded the original complaint. They have also remained in custody since that time.

Trial on this matter began in June, 1993 and a mistrial was declared in January of 1994. During that trial both defendants admitted that they had killed their parents but claimed that they did so only after years of abuse from their parents. They are currently awaiting retrial for the murders.

Tracy L. Baker was called as a witness for the defense and testified before the jury on October 12, 1993. She said that she had known Lyle and Erik Menendez since October, 1988, spent time at their home during late 1988, and had dinner at their home on several occasions.

She recalled an occasion five years earlier in which she was about to have dinner with the family when something unusual occurred. She, Erik, Lyle, and Jose Menendez were together in the family dining room while Kitty Menendez was still bringing plates of food from the kitchen to the dining table.

She said that as Mrs. Menendez placed food on the table Mr. Menendez stood up and violently pushed his

plate away from himself, knocking over all sorts of glasses and condiments. He said, "what did you do to this food?" He then told Erik and Lyle to go outside and wait because they were going to go out to eat.

Lyle motioned for Tracy to go with him. She grabbed her purse and coat and went outside to the front of the house. There they got in the car; Jose drove, Erik sat in front, she and Lyle sat in the back. Kitty did not come along. Erik asked his father, "Do you think she tried something on purpose?"

They went to the Hamburger Hamlet and had dinner. There was no discussion at the restaurant about the incident and she didn't ask about it. Mr. Menendez was not upset. She found him to be "charming" that evening.

This incident was used during closing argument by the defense. This incident provided the basis for the defense to argue that Kitty was trying to poison her family. It supported the contention of the defense that Kitty was an unstable woman and capable of killing or harming her family. It supported the contention of the defendants that they killed their parents out of fear for their own safety and are therefore responsible for voluntary manslaughter, rather than the crime of murder as alleged by the prosecution.

After deliberations began in the Lyle Menendez jury trial, a letter was brought to the authorities attention, which, a handwriting expert says, was written by Lyle Menendez. Kurt Kuhn, a Beverly Hills Police Department civilian employee, who holds the title of Senior Identification Technician in charge of the Identification Bureau

of the Beverly Hills Police Department, whose responsibilities includes supervising and performing expert handwriting analysis for the Beverly Hills Police Department, compared this letter with a letter written by Lyle Menendez to a friend, Donovan Goodreau. Lyle Menendez admitted during trial that he wrote the Goodreau letter. Kuhn says that the two letters were written by one and the same person.

This newly discovered letter was first mentioned to us by an individual named Dominic Dunne. During deliberations, Mr. Dunne spoke to Deputy District Attorney Pamela Bozanich about a conversation he had previously engaged in with a woman named Norma Novelli, concerning her relationship with the defendant Lyle Menendez. While discussing with Ms. Bozanich the conversation he had engaged in with Ms. Novelli, Mr. Dunne also told Ms. Bozanich about a copy of a 2 page letter he had received, purportedly written by the defendant Lyle Menendez to a woman named Tracy Baker. He had two pages of the letter.

Ms. Tracy Baker had previously testified in Mr. Menendez's trial on his behalf, and this letter appeared to be a script for her testimony.

Based on this conversation between Mr. Dunne and DDA Bozanich, your Affiant was left with the impression that the letter came to Mr. Dunne from Ms. Novelli. On February 24, 1994, your Affiant spoke with Ms. Novelli. She explained that her first contact with the defendant Lyle Menendez came when he wrote to her to discuss an article she had written which he apparently had read while incarcerated. From this letter she and he began a

correspondence and by the summer of 1990 they were both writing each other and had exchanged phone numbers.

Your Affiant showed Ms. Novelli the two pages of the copy of the letter Mr. Dunne had spoken to Ms. Bozanich about and questioned her as to her knowledge concerning it. She said that her copy of the letter arrived in her post office box approximately 4 months ago. She said she immediately recognized the handwriting as belonging to Lyle Menendez. When asked if she had the letter, she said she still had the copy which had been sent to her. This copy included a missing third page. She gave your Affiant permission to take and copy the letter in its entirety. This copy was given to Kurt Kuhn and used for his comparison.

In this letter dated February 5, Lyle begins by telling Tracy that she should throw the letter away after she has absorbed the contents. He assures her that while what he is about to tell her may sound strange, it would be helpful to his case. He tells her that he feels she "can do it" but that if she would rather not, she should just let him know. He then tells her that the "first incident" is as follows:

> "You and I had spent the day together. Mrs. Menendez had cooked dinner and it was served in the dining room. Everyone was seated except Mrs. Menendez. She was still bringing this and that in from the kitchen. You were seated next to me with your back to the . . . seated at the head of the table to my left. Erik was seated across from us. Behind Mr. Menendez were the doors that open to the foyer. All the food was on the

table. There was lots of it but you don't remember what the food was. Anyway all of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "What did you do to the food?!" There was a long silence or at least it seemed long and then Mr. Menendez shoved his plate forward, knocking over some stuff. He got up and said something like "go out and wait for me by the car boys, we're going out to eat." Then I got up immediately and said "come on Traci" and we both walked out into the foyer. Erik walked out too. You got your purse and jacket. We walked outside and stood in front of the big Mercedes. Erik and I were discussing something, whispering. You were just kind of standing there confused and embarrassed. Then Mr. Menendez came storming out of the house. He seemed upset. Either Erik or I, (you can't remember which) said to him "What's the matter Dad, you think she tried something?" As Mr. Menendez was getting into the front seat he said, "I don't know, but I don't trust her today." We all got in the car, you and I in the back seats and we drove in silence listening to some radio station. We made a right coming out of our house but you're unsure the way we went after that. Anyway we ended up parking somewhere and eating at Hamburger Hamlet. It was a big one. We all ate dinner talking about various things. Mr. Menendez was charming. He paid the bill. We drove back home. You and I stayed out front and kissed for a long time. You didn't feel you should ask about what had happened earlier. You then left in your car. It wasn't that late. You never saw Mrs. Menendez. (It had just gotten dark when we left for Hamburger Hamlet.) You

drove home still confused about what happened in the dining room although it seemed obvious Mr. Menendez thought Mrs. Menendez did something to the food. You were dying to ask me what it was all about but you just couldn't. Ok, that's the first incident. You really don't need to know anymore detail than I've provided here. It was a long time ago. It would be strange if you remembered things too well. However you do remember the statements I mentioned above very well – who said what to whom. You don't remember the unimportant conversations like what was said at Hamburger Hamlet etc. The best answer to any question you don't know the answer to is, "I don't remember." It's obvious why you remember certain things and certain statements. It was scary and confusing.

On Thursday, March 17, 1994, Tracy Baker was served with a subpoena to appear before the Los Angeles Grand Jury on Monday, March 21, 1994 at 8:30 a.m. That subpoena directed her to produce all correspondence received from the defendant Lyle Menendez. Ms. Baker was served at the offices of her attorney, Paul L. Gabbert, located at 2115 Main Street in Santa Monica, California.

On Friday, March 18, 1994, Deputy District Attorney David Conn received a telephone call from Paul Gabbert. Mr. Gabbert informed DDA Conn that on Monday Tracy Baker would be asserting her Fifth Amendment privilege not to answer questions about the letter on the grounds that such answers may tend to incriminate her. He also requested that DDA Conn agree to delay her appearance before the Grand Jury so that he could have an opportunity to challenge that portion of the subpoena which directs her to produce correspondence received from Lyle

Menendez. He explained that he believes such correspondence to be testimonial in nature and as such, it too would fall within the scope of her Fifth Amendment privilege. DDA Conn refused to postpone Tracy Baker's appearance before the Grand Jury or suspend her obligation to produce the requested documents.

The original letter has yet to be found. It was apparently written by Lyle Menendez to be received by Tracy Baker. The letter contained certain information and a request that this information be used by Tracy Baker during her testimony. It appears from her testimony that she followed the instructions in the letter. It is believed that the letter was and still is in her possession.

Also, Tracy Baker testified to a long standing personal relationship with Lyle Menendez. Based on her testimony and the contents of the letter, it appears that she and the defendant Lyle Menendez were close friends who were involved in a correspondence during Lyle's incarceration. Based on the one letter which has come to the attention of authorities, it would appear that Lyle Menendez discussed in his correspondence with Tracy Baker matters which he desired her to testify to at his trial.

Thus it is believed that a search of her premises would reveal correspondence that would tend to prove that Ms. Baker presented perjured testimony and that Lyle Menendez encouraged Tracy Baker to testify falsely.

Attached hereto and made a part of this Affidavit are Attachment A (Transcript of Tracy Baker's trial testimony) and Attachment B (copy of three page letter directed to Ms. Baker).

I have read the foregoing affidavit and I declare under penalty of perjury that it is true and correct.

Executed this 18th day of March, 1994 at Los Angeles, California.

/s/ Leslie Zoeller
LESLIE ZOELLER

SW No. 36449

STATE OF CALIFORNIA – COUNTY OF LOS ANGELES RETURN TO SEARCH WARRANT

Leslie Zoeller, #99980 being sworn, says that he/she
(name of Affiant)
conducted a search pursuant to the below described search warrant:

Issuing Magistrate: William Pounders

Magistrate's Court: Superior Court, Los Angeles Judicial District

Date of Issuance: March 18, 1994

Date of Service: March 18, 1994

and searched the following:

29041 Aloma Avenue, Apartment 110, Laguna Niguel; further described as a two-story apartment complex, light stucco with dark trim. Apartment No. 110 is a downstairs apartment in approximately the center of the

complex and on the west side. The number "110" is written on the door. Also all storage compartments, garages and trash receptacles for Apartment No. 110.

and seized the items*

XX described in the attached and incorporated inventory described below:

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court in which the offense in respect to which the seized property is triable.

/s/ Leslie Zoeller
(Signature of Affiant)

Sworn to and subscribed before me this 24th day of March, 1994.

/s/ William R. Pounders
(Signature of Magistrate
WILLIAM R. POUNDERS
Judge of the Superior Court, Los Angeles,
Judicial District.

*List all items seized, including those not specifically listed on the warrant.

CITY OF BEVERLY HILLS
POLICE DEPARTMENT

EVIDENCE AND PROPERTY RECORD

[LOGO] **Register No.** _____

Date 3/18/94 Time 2015

CRIME TYPE 187 P.C.

Officer/I.D. No. L. Zoeller

Officer/I.D. No. S. Miller

Arrest Case # _____

Crime Case # 890710

Other Case # _____

REFERENCE NAME(S):

BAKER, TRACI [ ] Arrestee
[ ] Victim
[X] Other

CHECK FOR LATENT PRINTS:

ITEM NO.(S) _____

Property Officer's Use Only	ITEM NO.	DESCRIPTION
	1	NEWSPAPERS W/ ARTICLES OF "MENENDEZ MURDER"
	2	5 MAGAZINES CONTAINING "MENENDEZ MURDER" STORIES
	3	LETTER DATED MARCH 5, 1993 TO TRACI BAKER FROM JILL LANSING

	4	3 PAGE TYPED & HANDWRITTEN INTERVIEW OF TRACI BAKER BY JILL LANSING, DATED 2-25-93
	5	(2) ENVELOPES W/"TRACI BAKER" WRITTEN ON THEM
	6	(5) PHOTOGRAPHS (ERIK & LYLE)
	7	RED NOTEBOOK W/NAME & ADDRESSES
	8	(2) BAGS OF LETTERS TO LYLE MENENDEZ (FROM APPARENT WELL WISHERS)

Temporary location of evidence:

Total Number Items

THIS SECTION TO BE COMPLETED BY PROPERTY OFFICER

Taken from temporary location & placed in evidence storage:

Date _____ Time _____

Location stored _____

By: _____

FINAL DISPOSITION OF EVIDENCE OR PROPERTY

RELEASED TO: [ ] Owner [ ] Other

Item No.(s) _____

RECEIVED BY: (Signature) _____

DATE/TIME _____

NAME: (Print) _____

RELEASED BY _____

ADDRESS: _____

AUTHORITY OF: _____

PHONE #: (____)_____

[ ] Confiscated [ ] Destroyed

[ ] Auctioned

Date _____

Items _____

Authority of _____ Property Officer _____

DISPO REVIEW DATE

_____

FINAL DISPOSITION STAMP

_____

_____

EXHIBIT C

Search Warrant No. [ ]

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
SEARCH WARRANT

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF, by affidavit, having been made before me by LESLIE ZOELLER, No. 99980 (name of affiant) that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

____ was stolen or embezzled

____ was used as the means of committing a felony

____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

X is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED to SEARCH

1. The person of Paul L. Gabbert and any briefcases or packages on his person at the time of the search. Your affiant met Mr. Gabbert on March 17, 1994, is familiar with his appearance and will search Mr. Gabbert for the documents through Special Master Elliott Oppenheim.

2. The person of Tracy Baker. Your affiant knows Tracy Baker, is familiar with her appearance and will search Tracy Baker for the documents.

for the following property:

any and all correspondence between Tracy Baker and Lyle Menendez.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 21st day of March, 1994 at 10:03 a.m.

/s/ _____
Signature of Magistrate

Judge of the Superior (Superior/~~Municipal~~) Court Los Angeles (Judicial District)

NIGHTTIME SERVICE ENDORSEMENT*

GOOD CAUSE HAVING BEEN SHOWN BY AFFIDAVIT, THIS WARRANT CAN BE SERVED AT ANY TIME OF THE DAY OR NIGHT.

n/a
Endorsement of Magistrate
for Nighttime Service

*Unless endorsed for nighttime service, this warrant can be served only between 7:00 a.m. and 10:00 p.m.

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

AFFIDAVIT FOR SEARCH WARRANT

LESLIE ZOELLER, No. 99980 (name of affiant), being sworn, says that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

____ was stolen or embezzled

____ was used as the means of committing a felony

____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

X is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH

1. The person of Paul L. Gabbert and any briefcases or packages on his person at the time of the search. Your affiant met Mr. Gabbert on March 17, 1994, is familiar with his appearance and will search Mr. Gabbert for the documents.

2. The person of Tracy Baker. Your affiant knows Tracy Baker, is familiar with her appearance and will search Tracy Baker for the documents.

for the following property:

any and all correspondence between Tracy Baker and Lyle Menendez.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a search warrant be issued for the seizure of said property or any part thereof, at any time of the day **OR NIGHT***, good cause therefore having been shown.

/s/ Leslie Zoeller
Signature of Affiant

Subscribed and sworn to
before me this 21st day of
MARCH, 1994.

/s/ _____
Signature of Magistrate
WILLIAM R. POUNDERS
Judge of the Superior (Superior/~~Municipal~~) Court
Los Angeles (Judicial District)

Prepared with the assistance of, or reviewed by:

_____
Deputy District Attorney

*Strike **OR NIGHT** if not applicable.

AFFIDAVIT

I, LESLIE ZOELLER, No. 99980, have been employed by the City of Beverly Hills Police Department as a police officer for 20 years 11 months. I have been a detective for 15 years 11 months, currently assigned to Robbery/Homicide Division. I am the Investigating Officer for the murders of Jose and Mary ("Kitty") Menendez which occurred on August 20, 1989 at 722 North Elm Drive, Beverly Hills, California.

Your affiant has interviewed in excess of 150 people in regard to the Menendez double homicide and has learned the following:

On August 20, 1989 your affiant responded to 722 North Elm Drive, Beverly Hills, and observed victims Jose and "Kitty" Menendez dead. Your affiant attended the autopsies of both decedents in which the cause of death for both was determined to be multiple shotgun blasts. Evidence observed by your affiant at the time of the crime leads to the conclusion that one or more 12 gauge shotguns were used, although no weapons have yet been recovered and no expended shells were recovered at the scene.

Sergeant Thomas Edmonds of the Beverly Hills Police Department interviewed the decedents' sons, Joseph (Lyle) and Erik Menendez, shortly after they called the police at 11:47 p.m. on August 20. Lyle and Erik indicated that on August 20, they returned home from the movies, they found their parents dead and immediately called the police.

Other evidence subsequently uncovered during the course of the investigation revealed that Erik and Lyle Menendez were involved in the murder of their parents.

Lyle Menendez was arrested for the murders of his parents on March 8, 1990. Erik Menendez surrendered to police and was arrested on March 11, 1990.

The defendants remained in custody up until they were indicted by the Los Angeles Grand Jury on December 7, 1992, an indictment which superseded the original complaint. They have also remained in custody since that time.

Trial on this matter began in June, 1993 and a mistrial was declared in January of 1994. During that trial both defendants admitted that they had killed their parents but claimed that they did so only after years of abuse from their parents. They are currently awaiting retrial for the murders.

Tracy L. Baker was called as a witness for the defense and testified before the jury on October 12, 1993. She said that she had known Lyle and Erik Menendez since October, 1988, spent time at their home during late 1988, and had dinner at their home on several occasions.

She recalled an occasion five years earlier in which she was about to have dinner with the family when something unusual occurred. She, Erik, Lyle, and Jose Menendez were together in the family dining room while Kitty Menendez was still bringing plates of food from the kitchen to the dining table.

She said that as Mrs. Menendez placed food on the table Mr. Menendez stood up and violently pushed his

plate away from himself, knocking over all sorts of glasses and condiments. He said, "what did you do to this food?" He then told Erik and Lyle to go outside and wait because they were going to go out to eat.

Lyle motioned for Tracy to go with him. She grabbed her purse and coat and went outside to the front of the house. There they got in the car; Jose drove, Erik sat in front, she and Lyle sat in the back. Kitty did not come along. Erik asked his father, "Do you think she tried something on purpose?"

They went to the Hamburger Hamlet and had dinner. There was no discussion at the restaurant about the incident and she didn't ask about it. Mr. Menendez was not upset. She found him to be "charming" that evening.

This incident was used during closing argument by the defense. This incident provided the basis for the defense to argue that Kitty was trying to poison her family. It supported the contention of the defense that Kitty was an unstable woman and capable of killing or harming her family. It supported the contention of the defendants that they killed their parents out of fear for their own safety and are therefore responsible for voluntary manslaughter, rather than the crime of murder as alleged by the prosecution.

After deliberations began in the Lyle Menendez jury trial, a letter was brought to the authorities attention, which, a handwriting expert says, was written by Lyle Menendez. Kurt Kuhn, a Beverly Hills Police Department civilian employee, who holds the title of Senior Identification Technician in charge of the Identification Bureau

of the Beverly Hills Police Department, whose responsibilities includes supervising and performing expert handwriting analysis for the Beverly Hills Police Department, compared this letter with a letter written by Lyle Menendez to a friend, Donovan Goodreau. Lyle Menendez admitted during trial that he wrote the Goodreau letter. Kuhn says that the two letters were written by one and the same person.

This newly discovered letter was first mentioned to us by an individual named Dominic Dunne. During deliberations, Mr. Dunne spoke to Deputy District Attorney Pamela Bozanich about a conversation he had previously engaged in with a woman named Norma Novelli, concerning her relationship with the defendant Lyle Menendez. While discussing with Ms. Bozanich the conversation he had engaged in with Ms. Novelli, Mr. Dunne also told Ms. Bozanich about a copy of a 2 page letter he had received, purportedly written by the defendant Lyle Menendez to a woman named Tracy Baker. He had two pages of the letter.

Ms. Tracy Baker had previously testified in Mr. Menendez's trial on his behalf, and this letter appeared to be a script for her testimony.

Based on this conversation between Mr. Dunne and DDA Bozanich, your Affiant was left with the impression that the letter came to Mr. Dunne from Ms. Novelli. On February 24, 1994, your Affiant spoke with Ms. Novelli. She explained that her first contact with the defendant Lyle Menendez came when he wrote to her to discuss an article she had written which he apparently had read while incarcerated. From this letter she and he began a

correspondence and by the summer of 1990 they were both writing each other and had exchanged phone numbers.

Your Affiant showed Ms. Novelli the two pages of the copy of the letter Mr. Dunne had spoken to Ms. Bozanich about and questioned her as to her knowledge concerning it. She said that her copy of the letter arrived in her post office box approximately 4 months ago. She said she immediately recognized the handwriting as belonging to Lyle Menendez. When asked if she had the letter, she said she still had the copy which had been sent to her. This copy included a missing third page. She gave your Affiant permission to take and copy the letter in its entirety. This copy was given to Kurt Kuhn and used for his comparison.

In this letter dated February 5, Lyle begins by telling Tracy that she should throw the letter away after she has absorbed the contents. He assures her that while what he is about to tell her may sound strange, it would be helpful to his case. He tells her that he feels she "can do it" but that if she would rather not, she should just let him know. He then tells her that the "first incident" is as follows:

> "You and I had spent the day together. Mrs. Menendez had cooked dinner and it was served in the dining room. Everyone was seated except Mrs. Menendez. She was still bringing this and that in from the kitchen. You were seated next to me with your back to the . . . seated at the head of the table to my left. Erik was seated across from us. Behind Mr. Menendez were the doors that open to the foyer. All the food was on the

table. There was lots of it but you don't remember what the food was. Anyway all of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "What did you do to the food?!" There was a long silence or at least it seemed long and then Mr. Menendez shoved his plate forward, knocking over some stuff. He got up and said something like "go out and wait for me by the car boys, we're going out to eat." Then I got up immediately and said "come on Traci" and we both walked out into the foyer. Erik walked out too. You got your purse and jacket. We walked outside and stood in front of the big Mercedes. Erik and I were discussing something, whispering. You were just kind of standing there confused and embarrassed. Then Mr. Menendez came storming out of the house. He seemed upset. Either Erik or I, (you can't remember which) said to him "What's the matter Dad, you think she tried something?" As Mr. Menendez was getting into the front seat he said, "I don't know, but I don't trust her today." We all got in the car, you and I in the back seats and we drove in silence listening to some radio station. We made a right coming out of our house but you're unsure the way we went after that. Anyway we ended up parking somewhere and eating at Hamburger Hamlet. It was a big one. We all ate dinner talking about various things. Mr. Menendez was charming. He paid the bill. We drove back home. You and I stayed out front and kissed for a long time. You didn't feel you should ask about what had happened earlier. You then left in your car. It wasn't that late. You never saw Mrs. Menendez. (It had just gotten dark when we left for Hamburger Hamlet.) You

drove home still confused about what happened in the dining room although it seemed obvious Mr. Menendez thought Mrs. Menendez did something to the food. You were dying to ask me what it was all about but you just couldn't. Ok, that's the first incident. You really don't need to know anymore detail than I've provided here. It was a long time ago. It would be strange if you remembered things too well. However you do remember the statements I mentioned above very well – who said what to whom. You don't remember the unimportant conversations like what was said at Hamburger Hamlet etc. The best answer to any question you don't know the answer to is, "I don't remember." It's obvious why you remember certain things and certain statements. It was scary and confusing.

On Thursday, March 17, 1994, Tracy Baker was served with a subpoena to appear before the Los Angeles Grand Jury on Monday, March 21, 1994 at 8:30 a.m. That subpoena directed her to produce all correspondence received from the defendant Lyle Menendez. Ms. Baker was served at the offices of her attorney, Paul L. Gabbert, located at 2115 Main Street in Santa Monica, California.

On Friday, March 18, 1994, Deputy District Attorney David Conn received a telephone call from Paul Gabbert. Mr. Gabbert informed DDA Conn that on Monday Tracy Baker would be asserting her Fifth Amendment privilege not to answer questions about the letter on the grounds that such answers may tend to incriminate her. He also requested that DDA Conn agree to delay her appearance before the Grand Jury so that he could have an opportunity to challenge that portion of the subpoena which directs her to produce correspondence received from Lyle

Menendez. He explained that he believes such correspondence to be testimonial in nature and as such, it too would fall within the scope of her Fifth Amendment privilege. DDA Conn refused to postpone Tracy Baker's appearance before the Grand Jury or suspend her obligation to produce the requested documents.

The original letter has yet to be found. It was apparently written by Lyle Menendez to be received by Tracy Baker. The letter contained certain information and a request that this information be used by Tracy Baker during her testimony. It appears from her testimony that she followed the instructions in the letter. It is believed that the letter was and still is in her possession.

Also, Tracy Baker testified to a long standing personal relationship with Lyle Menendez. Based on her testimony and the contents of the letter, it appears that she and the defendant Lyle Menendez were close friends who were involved in a correspondence during Lyle's incarceration. Based on the one letter which has come to the attention of authorities, it would appear that Lyle Menendez discussed in his correspondence with Tracy Baker matters which he desired her to testify to at his trial.

On March 18, 1994, your Affiant obtained a search warrant from Judge Pounders. Los Angeles Superior Court, to search the home of Tracy Baker. During the execution of that warrant your Affiant informed Tracy Baker that the primary object of the search warrant was any correspondence between her and Lyle Menendez and that if she had any such correspondence in her residence and would direct him to it, that would facilitate a speedy

execution of the warrant. Ms. Baker informed your Affiant at that time that such correspondence existed and that she had gathered all such correspondence together and turned it over to her attorney Paul L. Gabbert.

This morning in the Criminal Courts Building, Mr. Gabbert informed Deputy District Attorney David Conn that he has all the documents referred to in this warrant in his possession and on his person. He was in the company of Tracy Baker who is to appear before the Grand Jury at 10:00 a.m. this morning. Paul Gabbert had sought to challenge Baker's Grand Jury subpoena directing her to produce correspondence between her and Lyle Menendez before Judge James Bascue on March 18, 1994. Judge Bascue denied his motion without prejudice. Mr. Gabbert still objects to the production of the documents. It is the prosecutor's intention to seize the documents pursuant to this search warrant from Mr. Gabbert or from Tracy Baker if Mr. Gabbert returns the documents to her this morning before service of this warrant.

Thus it is believed that a search of the person of Paul Gabbert, his briefcase, and the person of Tracy Baker would reveal correspondence that would tend to prove that Ms. Baker presented perjured testimony and that Lyle Menendez encouraged Tracy Baker to testify falsely.

Your Affiant also will be in the presence of Elliott Oppenheim, Attorney at Law, who fulfills the requirements of Special Master as set out in Penal Code Section 1524(1). Your Affiant requests the appointment of Mr. Oppenheim as Special Master pursuant to this section to assist in the search of Mr. Gabbert's documents.

Attached hereto and made a part of this Affidavit are Attachment A (Transcript of Tracy Baker's trial testimony) and Attachment B (copy of three page letter to Ms. Baker.)

I have read the foregoing affidavit and I declare under penalty of perjury that it is true and correct.

Executed this 21st day of March, 1994 at Los Angeles, California.

/s/ Leslie Zoeller
LESLIE ZOELLER

SW No. 36450

STATE OF CALIFORNIA – COUNTY OF LOS ANGELES RETURN TO SEARCH WARRANT

Leslie Zoeller, #99980 being sworn, says that he/she
(name of Affiant)
conducted a search pursuant to the below described search warrant:

Issuing Magistrate: William Pounders

Magistrate's Court: Superior Court, Los Angeles Judicial District

Date of Issuance: March 21, 1994

Date of Service: March 21, 1994

and searched the following:

1. The person of Paul L. Gabbert and any briefcases or packages on his person at the time of the search. Your affiant met Mr. Gabbert on March 17, 1994, is familiar with his appearance and will search Mr. Gabbert for the documaents [sic]/through Special Master Elliot Oppenheim.

2. The person of Tracy Baker. Your affiant knows Tracy Baker, is familiar with her appearance and will search Tracy Baker for the documaents [sic].

and seized the items*

described in the attached and incorporated inventory described below:

**No property seized

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court in which the offense in respect to which the seized property is triable.

/s/ Leslie Zoeller
(Signature of Affiant)

Sworn to and subscribed before me this 24th day of March, 1994.

/s/ Wm. Pounders
(Signature of Magistrate
WILLIAM R. FOUNDERS
Judge of the Superior Court, Los Angeles,
Judicial District.

*List all items seized, including those not specifically listed on the warrant.

[ ]

EXHIBIT D

STATE OF CALIFORNIA –
COUNTY OF LOS ANGELES

SEARCH WARRANT AND AFFIDAVIT

(AFFIDAVIT)

LESLIE ZOELLER, No. 99980 (Name of Affiant), being sworn, says that on the basis of the information contained within this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/s/ Leslie Zoeller (Signature of Affiant), NIGHT SEARCH REQUESTED: YES [ ] NO [ ]

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES: proof by affidavit having been made before me by LESLIE ZOELLER, No. 99980 (Name of Affiant), that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

____ was stolen or embezzled

____ was used as the means of committing a felony

____ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery,

__X__ tends to show that a felony has been committed or that a particular person has committed a felony,

____ tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3, has occurred or is occurring;

YOU ARE THEREFORE COMMANDED TO SEARCH:

1. The Law offices of Paul L. Gabbert, located at the Main Street Law Building, 2115 Main Street, Santa Monica, California; and any file cabinets, desks, computers and storage areas within that office. Mr. Gabbert's office is clearly identified as the Office of Paul Gabbert on the exterior of the office. Search to be made through Special Master *Elliott Oppenheim*. /s/ WP

FOR THE FOLLOWING PROPERTY:

Any and all correspondence by and between Traci Baker and Lyle Menendez to each other.

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to and subscribed before me this 21st day of March, 1994, at 11:55 A.M. ~~P.M.~~, Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

/s/ Wm R. Pounders (Signature of Magistrate), WILLIAM R. POUNDERS

NIGHT SEARCH APPROVED: YES [ ] NO [✓] Judge of the Superior/~~Municipal~~ Court, Los Angeles Judicial District

---

AFFIDAVIT

I, LESLIE ZOELLER, No. 99980, have been employed by the City of Beverly Hills Police Department as a police officer for 20 years 11 months. I have been a detective for 15 years 11 months, currently assigned to Robbery/ Homicide Division. I am the Investigating Officer for the murders of Jose and Mary ("Kitty") Menendez which occurred on August 20, 1989 at 722 North Elm Drive, Beverly Hills, California.

Your affiant has interviewed in excess of 150 people in regard to the Menendez double homicide and has learned the following:

On August 20, 1989 your affiant responded to 722 North Elm Drive, Beverly Hills, and observed victims Jose and "Kitty" Menendez dead. Your affiant attended the autopsies of both decedents in which the cause of death for both was determined to be multiple shotgun blasts. Evidence observed by your affiant at the time of the crime leads to the conclusion that one or more 12 gauge shotguns were used, although no weapons have yet been recovered and no expended shells were recovered at the scene.

Sergeant Thomas Edmonds of the Beverly Hills Police Department interviewed the decedents' sons, Joseph (Lyle) and Erik Menendez, shortly after they called the police at 11:47 p.m. on August 20. Lyle and Erik indicated that on August 20, they returned home from the movies, they found their parents dead and immediately called the police.

Other evidence subsequently uncovered during the course of the investigation revealed that Erik and Lyle Menendez were involved in the murder of their parents.

Lyle Menendez was arrested for the murders of his parents on March 8, 1990. Erik Menendez surrendered to police and was arrested on March 11, 1990.

The defendants remained in custody up until they were indicted by the Los Angeles Grand Jury on December 7, 1992, an indictment which superseded the original complaint. They have also remained in custody since that time.

Trial on this matter began in June, 1993 and a mistrial was declared in January of 1994. During that trial both defendants admitted that they had killed their parents but claimed that they did so only after years of abuse from their parents. They are currently awaiting retrial for the murders.

Tracy L. Baker was called as a witness for the defense and testified before the jury on October 12, 1993. She said that she had known Lyle and Erik Menendez since October, 1988, spent time at their home during late 1988, and had dinner at their home on several occasions.

She recalled an occasion five years earlier in which she was about to have dinner with the family when something unusual occurred. She, Erik, Lyle, and Jose Menendez were together in the family dining room while Kitty Menendez was still bringing plates of food from the kitchen to the dining table.

She said that as Mrs. Menendez placed food on the table Mr. Menendez stood up and violently pushed his plate away from himself, knocking over all sorts of glasses and condiments. He said, "what did you do to this food?" He then told Erik and Lyle to go outside and wait because they were going to go out to eat.

Lyle motioned for Tracy to go with him. She grabbed her purse and coat and went outside to the front of the house. There they got in the car; Jose drove, Erik sat in front, she and Lyle sat in the back. Kitty did not come along. Erik asked his father, "Do you think she tried something on purpose?"

They went to the Hamburger Hamlet and had dinner. There was no discussion at the restaurant about the incident and she didn't ask about it. Mr. Menendez was not upset. She found him to be "charming" that evening.

This incident was used during closing argument by the defense. This incident provided the basis for the defense to argue that Kitty was trying to poison her family. It supported the contention of the defense that Kitty was an unstable woman and capable of killing or harming her family. It supported the contention of the defendants that they killed their parents out of fear for

their own safety and are therefore responsible for voluntary manslaughter, rather than the crime of murder as alleged by the prosecution.

After deliberations began in the Lyle Menendez jury trial, a letter was brought to the authorities attention, which, a handwriting expert says, was written by Lyle Menendez. Kurt Kuhn, a Beverly Hills Police Department civilian employee, who holds the title of Senior Identification Technician in charge of the Identification Bureau of the Beverly Hills Police Department, whose responsibilities includes supervising and performing expert handwriting analysis for the Beverly Hills Police Department, compared this letter with a letter written by Lyle Menendez to a friend, Donovan Goodreau. Lyle Menendez admitted during trial that he wrote the Goodreau letter. Kuhn says that the two letters were written by one and the same person.

This newly discovered letter was first mentioned to us by an individual named Dominic Dunne. During deliberations, Mr. Dunne spoke to Deputy District Attorney Pamela Bozanich about a conversation he had previously engaged in with a woman named Norma Novelli, concerning her relationship with the defendant Lyle Menendez. While discussing with Ms. Bozanich the conversation he had engaged in with Ms. Novelli, Mr. Dunne also told Ms. Bozanich about a copy of a 2 page letter he had received, purportedly written by the defendant Lyle Menendez to a woman named Tracy Baker. He had two pages of the letter.

Ms. Tracy Baker had previously testified in Mr. Menendez's trial on his behalf, and this letter appeared to be a script for her testimony.

Based on this conversation between Mr. Dunne and DDA Bozanich, your Affiant was left with the impression that the letter came to Mr. Dunne from Ms. Novelli. On February 24, 1994, your Affiant spoke with Ms. Novelli. She explained that her first contact with the defendant Lyle Menendez came when he wrote to her to discuss an article she had written which he apparently had read while incarcerated. From this letter she and he began a correspondence and by the summer of 1990 they were both writing each other and had exchanged phone numbers.

Your Affiant showed Ms. Novelli the two pages of the copy of the letter Mr. Dunne had spoken to Ms. Bozanich about and questioned her as to her knowledge concerning it. She said that her copy of the letter arrived in her post office box approximately 4 months ago. She said she immediately recognized the handwriting as belonging to Lyle Menendez. When asked if she had the letter, she said she still had the copy which had been sent to her. This copy included a missing third page. She gave your Affiant permission to take and copy the letter in its entirety. This copy was given to Kurt Kuhn and used for his comparison.

In this letter dated February 5, Lyle begins by telling Tracy that she should throw the letter away after she has absorbed the contents. He assures her that while what he is about to tell her may sound strange, it would be helpful to his case. He tells her that he feels she "can do

it" but that if she would rather not, she should just let him know. He then tells her that the "first incident" is as follows:

> "You and I had spent the day together. Mrs. Menendez had cooked dinner and it was served in the dining room. Everyone was seated except Mrs. Menendez. She was still bringing this and that in from the kitchen. You were seated next to me with your back to the . . . seated at the head of the table to my left. Erik was seated across from us. Behind Mr. Menendez were the doors that open to the foyer. All the food was on the table. There was lots of it but you don't remember what the food was. Anyway all of a sudden Mr. Menendez said in a stern voice to Mrs. Menendez who was standing behind you, "What did you do to the food?!" There was a long silence or at least it seemed long and then Mr. Menendez shoved his plate forward, knocking over some stuff. He got up and said something like "go out and wait for me by the car boys, we're going out to eat." Then I got up immediately and said "come on Traci" and we both walked out into the foyer. Erik walked out too. You got your purse and jacket. We walked outside and stood in front of the big Mercedes. Erik and I were discussing something, whispering. You were just kind of standing there confused and embarrassed. Then Mr. Menendez came storming out of the house. He seemed upset. Either Erik or I, (you can't remember which) said to him "What's the matter Dad, you think she tried something?" As Mr. Menendez was getting into the front seat he said, "I don't know, but I don't trust her today." We all got in the car, you and I in the back seats and we drove

in silence listening to some radio station. We made a right coming out of our house but you're unsure the way we went after that. Anyway we ended up parking somewhere and eating at Hamburger Hamlet. It was a big one. We all ate dinner talking about various things. Mr. Menendez was charming. He paid the bill. We drove back home. You and I stayed out front and kissed for a long time. You didn't feel you should ask about what had happened earlier. You then left in your car. It wasn't that late. You never saw Mrs. Menendez. (It had just gotten dark when we left for Hamburger Hamlet.) You drove home still confused about what happened in the dining room although it seemed obvious Mr. Menendez thought Mrs. Menendez did something to the food. You were dying to ask me what it was all about but you just couldn't. Ok, that's the first incident. You really don't need to know anymore detail than I've provided here. It was a long time ago. It would be strange if you remembered things too well. However you do remember the statements I mentioned above very well – who said what to whom. You don't remember the unimportant conversations like what was said at Hamburger Hamlet etc. The best answer to any question you don't know the answer to is, "I don't remember." It's obvious why you remember certain things and certain statements. It was scary and confusing.

On Thursday, March 17, 1994, Tracy Baker was served with a subpoena to appear before the Los Angeles Grand Jury on Monday, March 21, 1994 at 8:30 a.m. That subpoena directed her to produce all correspondence received from the defendant Lyle Menendez. Ms. Baker

was served at the offices of her attorney, Paul L. Gabbert, located at 2115 Main Street in Santa Monica, California.

On Friday, March 18, 1994, Deputy District Attorney David Conn received a telephone call from Paul Gabbert. Mr. Gabbert informed DDA Conn that on Monday Tracy Baker would be asserting her Fifth Amendment privilege not to answer questions about the letter on the grounds that such answers may tend to incriminate her. He also requested that DDA Conn agree to delay her appearance before the Grand Jury so that he could have an opportunity to challenge that portion of the subpoena which directs her to produce correspondence received from Lyle Menendez. He explained that he believes such correspondence to be testimonial in nature and as such, it too would fall within the scope of her Fifth Amendment privilege. DDA Conn refused to postpone Tracy Baker's appearance before the Grand Jury or suspend her obligation to produce the requested documents.

The original letter has yet to be found. It was apparently written by Lyle Menendez to be received by Tracy Baker. The letter contained certain information and a request that this information be used by Tracy Baker during her testimony. It appears from her testimony that she followed the instructions in the letter. It is believed that the letter was and still is in her possession.

Also, Tracy Baker testified to a long standing personal relationship with Lyle Menendez. Based on her testimony and the contents of the letter, it appears that she and the defendant Lyle Menendez were close friends who were involved in a correspondence during Lyle's incarceration. Based on the one letter which has come to

the attention of authorities, it would appear that Lyle Menendez discussed in his correspondence with Tracy Baker matters which he desired her to testify to at his trial.

On March 18, 1994, your Affiant obtained a search warrant from Judge Pounders, Los Angeles Superior Court, to search the home of Tracy Baker. During the execution of that warrant your Affiant informed Tracy Baker that the primary object of the search warrant was any correspondence between her and Lyle Menendez and that if she had any such correspondence in her residence and would direct him to it, that would facilitate a speedy execution of the warrant. Ms. Baker informed your Affiant at that time that such correspondence existed and that she had gathered all such correspondence together and turned it over to her attorney Paul L. Gabbert.

This morning in the Criminal Courts Building, Mr. Gabbert informed Deputy District Attorney David Conn that he has all the documents referred to in this warrant in his possession and on his person. He was in the company of Tracy Baker who is to appear before the Grand Jury at 10:00 a.m. this morning. Paul Gabbert had sought to challenge Baker's Grand Jury subpoena directing her to produce correspondence between her and Lyle Menendez before Judge James Bascue on March 18, 1994. Judge Bascue denied his motion without prejudice. Mr. Gabbert still objects to the production of the documents. It is the prosecutor's intention to seize the documents pursuant to this search warrant from Mr. Gabbert or from Tracy Baker if Mr. Gabbert returns the documents to her this morning before service of this warrant.

On March 21, 1994, under the guidance of Special Master Elliott Oppenheim, a search of Paul Gabbert's person and briefcase, did not produce the documents. Your Affiant believes that a search of his offices will product the documents since he told Deputy Distirct Attorney David Conn he was in possession of such documents and Tracy Baker told your Affiant on Friday, March 18, 1994 that she turned the documents over to her attorney.

Thus it is believed that a search of Law Offices of Paul Gabbert reveal correspondence that would tend to prove that Ms. Baker presented perjured testimony and that Lyle Menendez encouraged Tracy Baker to testify falsely.

Your Affiant also will be in the presence of Elliott Oppenheim, Attorney at Law, who fulfills the requirements of Special Master as set out in Penal Code Section 1524(1). Your Affiant requests the appointment of Mr. Oppenheim as Special Master pursuant to this section to assist in the search of Mr. Gabbert's documents.

Attached hereto and made a part of this Affidavit are Attachment A (Transcript of Tracy Baker's trial testimony) and Attachment B (copy of three page letter to Ms. Baker.)

I have read the foregoing affidavit and I declare under penalty of perjury that it is true and correct.

Executed this 21st day of March, 1994 at Los Angeles, California.

/s/ Leslie Zoeller
LESLIE ZOELLER

SW No. 36451

STATE OF CALIFORNIA – COUNTY OF LOS ANGELES RETURN TO SEARCH WARRANT

Leslie Zoeller, #99980 being sworn, says that he/she
(name of Affiant)
conducted a search pursuant to the below described search warrant:

Issuing Magistrate: William Pounders

Magistrate's Court: Superior Court, Los Angeles Judicial District

Date of Issuance: March 21, 1994

Date of Service: March 21, 1994

and searched the following:

1. The Law offices of Paul L. Gabbert, located at the Main Street Law Building, 2115 Main Street, Santa Monica, California; and any file cabinets, desks, computers and storage areas within that office. Mr. Gabbert's office is clearly identified as the Office of Paul Gabbert on the exterior of the office. Search to be made through Special Master Elliott Oppenheim.

and seized the items*

XX described in the attached and incorporated inventory described below:

I further swear that this is a true and detailed account of all the property taken by me pursuant to the search warrant, and that pursuant to Penal Code Sections 1528 and 1536 this property will be retained in my custody, subject to the order of this court in which the offense in respect to which the seized property is triable.

/s/ Leslie Zoeller
(Signature of Affiant)

Sworn to and subscribed before me this 24th day of March, 1994.

/s/ Wm. Founders
(Signature of Magistrate)
WILLIAM R. FOUNDERS
Judge of the Superior Court, Los Angeles, Judicial District.

*List all items seized, including those not specifically listed on the warrant.

POLICE DEPARTMENT

EVIDENCE AND PROPERTY RECORD

[LOGO] **Register No. 37497**

Date 3/21/94 Time 1600 Hours

CRIME TYPE 187 P.C.

Officer/I.D. No. L. Zoeller/99980

Officer/I.D. No. _____

Arrest Case # _____

Crime Case # 8907101

Other Case # _____

REFERENCE NAME(S):

Gabbert, Paul L. [ ] Arrestee
[ ] Victim
[X] Other

CHECK FOR LATENT PRINTS:

ITEM NO.(S) _____

Property Officer's Use Only	ITEM NO.	DESCRIPTION
	1	Handwritten letter of two pages to "Traci" from Lyle; dated "Jan 12 1993"
	2	Five page handwritten letter to "Traci" from "Lyle"; dated "Jan 93"
	3	Two page handwritten letter to "TB" from "Lyle"; dated "March 10 1993"
	4	Three page handwritten letter to "TB" from "Lyle: dated "March 93"
	5	Four page handwritten letter to "TB" from "Lyle"; dated "March 93"
	6	One page handwritten letter to "TB" from "Lyle"; dated "April 20, 93"
	7	Two page handwritten letter to "TB" from "Lyle"; "April 24 93"
	8	One page handwritten letter to "TB" from "Lyle"; dated "May 12, 93"
	9	Four page handwritten letter to "TB" from "Lyle"; dated "Sunday May 30"
	10	Two page handwritten letter to "TB" from "Lyle"; undated
	11	Three page handwritten letter to "TB" from "Lyle"; dated "Friday night"

Temporary location of evidence:

Evidence locker # Total Number Items 11

THIS SECTION TO BE COMPLETED BY PROPERTY OFFICER

Taken from temporary location & placed in evidence storage:

Date _____ Time _____

Location stored _____

By: _____

FINAL DISPOSITION OF EVIDENCE OR PROPERTY

RELEASED TO: [ ] Owner [ ] Other

Item No.(s) _____

RECEIVED BY: (Signature) _____

DATE/TIME _____ _____

NAME: (Print) _____

RELEASED BY _____

ADDRESS: _____

AUTHORITY OF: _____

PHONE #: (___) _____

[ ] Confiscated [ ] Destroyed

[ ] Auctioned

Date _____

Items _____

Authority of _____ Property Officer _____

DISPO REVIEW DATE

_____

FINAL DISPOSITION STAMP

_____

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendants.	CASE NO. CV 94-4227 ABC (EX) NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS [FRCP 12(B)) (Filed Aug. 5, 1994) DATE: AUGUST 29, 1994 TIME: 10:00 A.M. COURTROOM: 690 Edward R. Royball Center 255 East Temple Street Los Angeles, California 90012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendants.	CASE NO. CV 94-4227 ABC (EX) NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS [FRCP 12(B)] DATE: AUGUST 29, 1994 TIME: 10:00 A.M. COURTROOM: 690 Edward R. Royball Center 255 East Temple Street Los Angeles, California 90012

TO PLAINTIFF AND YOUR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on August 29, 1994 at 10:00 a.m. before the Honorable A.B. Collins in Courtroom 690, located at 255 East Temple Street, Los Angeles, California, Defendants David Conn and Carol Najera, shall move pursuant to the provisions of Federal Rule of Civil Procedure 12(b), to Dismiss the First and Second causes of action (claims) of the complaint on each of the following grounds:

1) Defendants Conn and Najera are absolutely immune from Civil liability under the doctrine of prosecutorial immunity.

2) Defendants Conn and Najera are immune from civil liability under the doctrine of qualified immunity.

3) Defendants Conn and Najera are not liable because they did not personally participate in the search of plaintiff.

This motion shall be based upon this notice, the attached memorandum of points and authorities, pleadings, papers and files of this action and any other matter the court deems appropriate.

Dated: August 5, 1994

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
CONN and NAJIRA [sic]

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

According to the complaint, plaintiff Paul L. Gabbert, was and is an attorney who represented a witness, Tracy L. Baker, who was to testify in the highly publicized case of *People v. Eric and Lyle Menendez*. The complaint also alleges that Tracy Baker was under investigation by the Los Angeles County Grand Jury and the District Attorney's Office. The complaint further alleges that on March 21, 1994, plaintiff appeared with his client, Tracy Baker, at the Los Angeles County Criminal Courts Building so that Ms. Baker could give testimony before the Los Angeles County Grand Jury.

Shortly before Ms. Baker was to testify before the Grand Jury, plaintiff alleges that he was served with a search warrant for the persons of himself and Ms. Baker, plus the briefcase and packages he was carrying. According to the warrant, the search of plaintiff was to be conducted by "Special Master", Elliot Oppenheim.

In accordance with the warrant, plaintiff's person, briefcase and packages were searched by defendant Oppenheim in a separate and private room, and only Oppenheim and plaintiff were present during the first search. After plaintiff's files and briefcase were searched by defendant Oppenheim, defendant Leslie Zoeller, a detective with the Beverly Hills Police Department, searched plaintiff's files and briefcase again. According to the complaint defendants David Conn and Carol Najera observed the search conducted by Zoeller, and viewed the contents of plaintiffs files, but they did not direct, supervise or personally participate in either the

first nor second search. Furthermore, defendant Conn departed the room midway through the second search conducted by defendant Zoeller.

Plaintiff's complaint contends that defendants Conn and Najera, who are both deputy district attorneys (prosecutors) somehow violated his constitutional rights by having knowledge that a search warrant for plaintiff's briefcase and files was being obtained, and then observing a second search of plaintiff's briefcase and files that was conducted by a police detective pursuant to a facially valid warrant.

II. PROSECUTORS CONN AND NAJIRA [sic] ARE ABSOLUTELY IMMUNE FROM CIVIL RIGHTS LIABILITY.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed 2d 123 (1976), the U.S. Supreme Court established the rule that prosecutors are entitled to absolute immunity from liability under the Civil Rights Act, 42 U.S.C. Section 1983, for any acts or omissions performed within the course and scope of their authority or closely associated with the criminal process. In *Imbler*, plaintiff, who was convicted of murder, brought a civil rights action under 42 U.S.C. Section 1983 against the prosecuting attorney on the grounds that the prosecutor knowingly used false testimony and suppressed material evidence in order to convict plaintiff of murder. The issue before the court in *Imbler* was whether a prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution could be held liable under Section 1983. The Court held that the prosecutor

was entitled to absolute immunity for both initiating and pursuing the criminal prosecution, by stating:

> "We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force . . . We hold only that in initiating a prosecution and presenting the state's case, the prosecutor is immune from a civil suit for damages under §1983."

In *Burns v. Reed*, 500 U.S. ___, 111 S.Ct. 1934, 114 L.Ed. 2d 547 (1991) , the court held that a prosecutor has absolute immunity from liability for damages under 42 U.S.C. Section 1983 for participating in a probable cause hearing.[1] In *Burns*, the prosecutor participated in a probable cause hearing where he examined a witness and successfully supported an application for a search warrant. The Supreme Court held that the foregoing activities of the prosecutor fell within the bounds of absolute prosecutorial immunity, by stating at page 1942 as follows:

> "The prosecutor's actions at issue here – appearing before a judge and presenting evidence in support of a motion for a search warrant – clearly involve the prosecutor's role as advocate for the state, rather than his role as administrator or investigative officer . . . 'Moreover, since the issuance of a search warrant is unquestionably a judicial act, appearing

---

[1] The Court in *Burns v. Reed. Id.* held that prosecutors have only qualified immunity for giving legal advice.

at a probable cause hearing is intimately associated with the judicial phase of the criminal process . . . ' Accordingly, we hold that respondent's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity."

In *Ashelman v. Pope,* 793 F.2d 1072, 1075 (9th Cir. 1986), *en banc,* the Ninth Circuit adopted and followed the principles of prosecutorial immunity set forth in *Imbler v. Pachtman, supra,* stating:

"Prosecutors are also entitled to absolute immunity from section 1983 claims. Such immunity applies even if it leaves the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.' " (Citations omitted)

Furthermore, the court in *Ashelman v. Pope, supra,* expressly *overruled* the case of *Beard v. Udall,* 648 F.2d 1264 (9th Cir. 1985), which stood for the proposition that a prosecutor may be found liable for filing charges he knows to be baseless, by declaring as follows at page 1078:

"Prosecutors are absolutely immune for quasi-judicial activities taken within the scope of their authority. To *the extent that Rankin and Beard are to the contrary, they are overruled."* (Emphasis added)

In the instant action, plaintiff's Section 1983 claim against prosecutors Conn and Najera is predicated on their participation in a Grand Jury hearing in which plaintiff's client, Tracy Baker was both a witness, as well

as a subject of the investigation. For example, the complaint alleges that the searches conducted by defendants Oppenheim and Zoeller, and only partially observed but not personally participated in by Conn or Najera, interfered with plaintiff's attorney client relationship with Ms. Baker and violated the Sixth Amendment. *See* paragraph 57(a) of the complaint. The complaint also alleges that the searches prevented plaintiff from protecting his client's fifth amendment right against self-incrimination. *See* paragraph 57(b) of the complaint. In addition, the complaint alleges that the searches violated the work-product and attorney-client privileges. *See* paragraph 57(f).

Plaintiff's Section 1983 claims against defendants Conn and Najera either arise from or are related to the Grand Jury Proceeding, which is a judicial proceeding where both Conn and Najera acted as advocates for the State of California. Hence, defendants Conn and Najera are entitled to absolute prosecutorial immunity because their *alleged* wrongful acts were intimately and closely associated with the criminal process.

Plaintiff cannot pierce the prosecutors absolute immunity shield for the reason that neither Conn nor Najera were involved in administrative or investigation activities. For example, the searches of plaintiff were conducted by defendants Oppenheim (Special Master) and Detective Zoeller. More importantly, Conn and Najera were not even present when Oppenheim searched plaintiff and they merely observed and did not personally participate in the search conducted by Zoeller.

Plaintiff does not contend that either Conn or Najera prepared the warrant application and there is no claim

that the prosecutors made any investigations in order to assist detective Zoeller in obtaining the search warrants. Moreover, there is no allegation that the prosecutors gave any legal advice to defendants Oppenheim or Zoeller.

Due to plaintiff's failure to allege that defendants Conn or Zoeller participated in some administrative or investigative activities that actually caused the searches of plaintiff, both Conn and Najera are entitled to absolute prosecutorial immunity.

III. DEFENDANTS CONN AND NAJIRA [sic] ARE ENTITLED TO QUALIFIED IMMUNITY.

Government officials performing discretionary functions enjoy qualified immunity from Section 1983 liability for actions performed in the course of their official duties, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed. 2d 396 (1982); *Houghton v. South,* 965 F.2d 1532, 1534 (9th Cir. 1992). Thus, qualified immunity is a defense to lawsuits against governmental officials arising out of the performance of their duties, and its purpose is to permit such officials to conscientiously undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time, but are later held to violate statutory or constitutional rights. *See Kraus v. County of Pierce,* 793 F.2d 1108 (9th Cir. 1986); *See Also Hemphill v. Kincheloe,* 987 F.2d 589, 592-593 (9th Cir. 1993) (The qualified immunity doctrine gives ample room for mistaken judgments by protecting all but

the plainly incompetent or those who knowingly violate the law).

The test for qualified immunity is the objective legal reasonableness of an employees' acts. *See Davis v. Scherer,* 468 U.S. 183, 191, 104 S.Ct. 3012, 3018; 82 L.Ed 2d 139 (1984); *Hemphill v. Kincheloe, supra* at page 593 (If a reasonable official could have believed that his actions were lawful, summary judgment on the basis of qualified immunity is appropriate). The question of the objective legal reasonableness of an officials' acts is one of law to be decided by the trial court, and not the jury. *See Hunter v. Bryant,* ___ U.S. ___, 112 S.Ct. 534, 536, 116 L.Ed. 2d 989 (1991); *Act Up Portland v. Bagley,* 988 F.2d 868, 872-873 (9th Cir. 1993); *Hemphill v. Kincheloe, supra* at page 592.

In *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991) the court explained the shifting burdens of proof that apply to the qualified immunity defense, by stating:

> "The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct . . . if plaintiff carries this burden, then the officer's must prove that their conduct was reasonable even though it might have violated constitutional standards. *See also Houghton v. South, Id.* 1534; *Baker v. Racansky,* 887 F.2d 183, 186 (9th Cir. 1989)."

In *Romero v. Kitsap County, supra* at page 627, the Ninth Circuit succinctly summarized the test for application of qualified immunity, by stating as follows:

> "The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue." *See also Tribble v. Gardner,* 860 F.2d 321, 324 (9th Cir. 1988).

In the instant action, defendants Conn and Najera are entitled to qualified immunity because there is no clearly established law that a prosecutor who does not participate in a search made by a Special Master, pursuant to a facially valid warrant, has committed a constitutional violation. In addition, there is no clearly established law that a prosecutor commits a constitutional violation by observing a search conducted by a police officer pursuant to a facially valid warrant. Thus, unless plaintiff can cite or refer the court to some clearly established law that defendants Conn and Najera allegedly violated, then both prosecutors are entitled to qualified immunity.

Another reason that defendants Conn and Najera are immune from liability is because the two (2) searches made of plaintiff and his property were pursuant to facially valid warrants. The law is well established that government officials have qualified immunity for searches made pursuant to a facially valid warrant. *See Malley v. Briggs* 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986); *Anderson v. Creighton* 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Forster v. County of Santa Barbara* 896 F.2d 1146, 1147-1148 (9th Cir.

1990); *Morris v. County of Tehama* 795 F.2d 791, 795 (9th Cir. 1986).

Since there is no allegation in the complaint that the search warrants were invalid on their face, defendants Conn and Najera must be given qualified immunity.

IV. DEFENDANTS CONN AND NAJERA ARE NOT LIABLE BECAUSE THEY WERE NOT THE PROXIMATE CAUSE OF A CONSTITUTIONAL VIOLATION.

The doctrine of vicarious liability or respondeat superior liability is not applicable to claims brought under 42 U.S.C. Section 1983. *See Palmer v. Sanderson,* 9 F.3d 1433, 1438 (9th Cir. 1993); *Medrano v. City of Los Angeles,* 973 F.2d 1499, 1505 (9th Cir. 1993). Liability under Section 1983 arises only upon a showing of personal participation by the defendant. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989); *Fayle v. Stapley,* 607 F.2d 858, 862 (9th Cir. 1979). A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. *See Taylor v. List, Id.* at page 1045; *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675, 680-681 (9th Cir. 1984).

A person subjects another to the deprivation of a constitutional right within the meaning of Section 1983, if he does an affirmative act, or omits to perform an act which he is legally required to do that *causes* the deprivation of which complaint is made. *See Johnson v. Duffy* 588 F.2d 740, 743 (9th Cir. 1978); *Arnold v. IBM,* 637 F.2d 1350, 1355 (9th Cir. 1981). Moreover, the causation requirement

of a Section 1983 action is not satisfied by a showing of mere causation in fact, but instead, the plaintiff must establish proximate or legal causation. *See Arnold v. IBM, supra* at page 1355.

In the present action, the prosecutors did not prepare the applications for the search warrants and they did not assist in the preparation of the warrant affidavit or application. Neither prosecutor personally participated in the two (2) searches and the prosecutors did not direct or supervise either search. Furthermore, the complaint fails to allege any wrongful acts by Conn or Najera that was a proximate cause of the warrants being obtained, and there are no allegations that Conn or Najera gave legal advice to either Oppenheim nor Zoeller.

In light of the inadequate allegations made against the prosecutors it is apparent that plaintiff does not have a cognizable claim against either prosecutor.

Dated: August 5, 1994

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
COUNTY OF LOS ANGELES, et al.

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assist. County Counsel
KEVIN C. BRAZILE. Prin. Deputy County Counsel
648 Kenneth Hahn Hall of Administration
500 W. Temple Street, Los Angeles, CA 90012
Telephone: (213) 974-1943

Attorneys for Defendant
COUNTY OF LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff(s), vs. DAVID CONN, CAROL NAJERA, et al., Defendant(s).	**CASE NUMBER** CV 94-4227 ABC (Ex) **PROOF OF SERVICE/ ACKNOWLEDGMENT OF SERVICE**

I, the undersigned, certify and declare that I am over the age of 18 years employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On *August 5, 1994*, I served a true copy of:

NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS [FRCP 12(B)]

[ ] by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b);

[X] by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

Michael J. Lightfoot
TALCOTT, LIGHTFOOT,
VANDEVELDE
655 S. Hope Street, 13th Floor
Los Angeles, California 90017

Place of Mailing:
648 Kenneth Hahn Hall of Administration
500 W. Temple St.,
Los Angeles, CA 90012

Executed on *August 5*, 1994 at Los Angeles California.

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

/s/ Barbara J. Holmes
Signature of person making service

MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT, VANDEVELDE
WOEHRLE & SADOWSKY
655 SOUTH HOPE STREET, 13TH FLOOR
LOS ANGELES, CALIFORNIA 90017
(213) 622-4750

Attorneys for Plaintiff
Paul L. Gabbert

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X.) Defendants.	CASE NO. CV 94-4227-RSWL(Ex) PLAINTIFF GABBERT'S OPPOSITION TO DEFENDANTS' CONN AND NAJERA'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.PROC. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES (Filed Aug. 26, 1994) Date: September 19, 1994 Time: 10:00 a.m. Place: Courtroom 21

Defendant Paul L. Gabbert hereby submits the following opposition to defendants Conn and Najera's Motion to Dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6).

DATED: August 26, 1994

Respectfully submitted,
MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE, WOEHRLE &
SADOWSKY

/s/ Melissa N. Widdifield
By: MILISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I

INTRODUCTION

A. ALLEGATIONS IN THE COMPLAINT

This case involves the illegal search of an attorney which was conducted in the middle of a courthouse while the attorney was representing his client before the grand jury.

It is apparent from the defendants' moving papers that they have misapprehended both the thrust of the factual allegations set forth in plaintiff Gabbert's Complaint, as well as the relevant legal standards governing the factual analysis at issue. The defendants suggest that the pivotal issue presented by Mr. Gabbert's lawsuit is whether "A search made by a Special Master, pursuant to a facially valid warrant, [constitutes] a constitutional violation." *See* Defendants' Motion to Dismiss at p. 10. While, as phrased, this may be a correct statement of the law, it is of no moment in the present case.

The primary allegations contained in the Complaint are as follows:

1. That the search of Mr. Gabbert violated the Fourth Amendment in that:

a) the warrant to search his person was obtained in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978);

b) the execution of the warrant was in violation of California Penal Code § 1524, which governs searches of attorneys and compels adherence to the statute's specific mandatory provisions; and

c) the execution of the warrant was impermissibly general and broad.

2. That the search of Mr. Gabbert's attorney-client files constitutes a substantive due process violation in that:

a) the defendants' intrusion into Mr. Gabbert's relationship with his clients violated the sixth amendment and Penal Code § 1524;

b) the timing of the search was designed to prevent Mr. Gabbert from rendering effective assistance of counsel to his client in violation of the sixth amendment; and

c) the defendants knowingly contacted Mr. Gabbert's client in his absence, in violation of the sixth amendment and rules of professional conduct.

The defendants contend that they either did not cause the above-described violations, or are either absolutely or qualifiedly immune for such conduct. The defendants are wrong. As established below, the defendants were inextricably intertwined in all of the constitutional violations alleged. Furthermore, to the extent that the

California Penal Code Provision at issue here imposed mandatory duties on the defendants in conducting the searches of Mr. Gabbert, absolute immunity is unavailable to them. Finally, since the law governing the defendants' conduct was clearly established, and their violation of it was objectively unreasonable, qualified immunity is similarly unavailable to the defendants.

B. THE STANDARD GOVERNING A MOTION TO DISMISS

This case presents multiple factual issues. However, motions to dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6) only permit a facial attack on the allegations contained in the complaint. Moreover, such motions are generally viewed with disfavor in federal courts. *De La Cruz v. Torme*, 582 F.2d 45, 48 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979).

The Supreme Court has concretely defined the standard to be applied in ruling on a motion to dismiss:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)(footnote omitted). Furthermore, "the allegations of the complaint should be construed favorably to the pleader." *Id.* The inquiry, then, is not whether a plaintiff's success on the merits is likely, but a far more

limited inquiry, whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). As will be revealed, plaintiff has adequately plead each and every element of his claims for relief and the defendants' motion to dismiss should, accordingly, be denied.

II

STATEMENT OF FACTS

Plaintiff Paul L. Gabbert is an experienced criminal defense attorney who has practiced law in the Los Angeles area for almost twenty years. Complaint, ¶ 14. In February of 1994, Mr. Gabbert was hired to represent a young woman by the name of Tracy Baker, in connection with the Los Angeles County District Attorney's investigation of Ms. Baker regarding her testimony in the case of *People v. Lyle Menendez*. Complaint, ¶ 15. Defendants David Conn and Carol Najera, the deputy district attorneys investigating the matter, apparently believed Ms. Baker had perjured herself when testifying in the Menendez trial. Complaint, ¶ 16. In the course of their investigation, defendants Conn and Najera were seeking physical evidence, specifically a three page letter purportedly written by Lyle Menendez to Tracy Baker, to corroborate their suspicion that Ms. Baker had committed perjury. Complaint, ¶ 20. Defendant Conn advised Mr. Gabbert that Ms. Baker was a "target" of a grand jury investigation. Complaint, ¶ 17.

Mr. Gabbert agreed, at defendant Conn's request, to make Ms. Baker available to testify before the grand jury.

Id. Defendant Leslie Zoeller, a detective with the Beverly Hills Police Department, was to serve the subpoena. *Id.* Prior to serving the subpoena, but knowing Ms. Baker was represented by Mr. Gabbert, defendant Zoeller appeared at Ms. Baker's home and attempted to question her regarding the existence of the letter purportedly written by Mr. Menendez to Ms. Baker. Complaint, ¶ 18.

On Thursday, March 17, 1994, defendant Zoeller served Mr. Gabbert with a subpoena directing Ms. Baker to appear before the grand jury on Monday March 21, 1994. Complaint, ¶¶ 19-20. The subpoena sought correspondence between Mr. Menendez and Ms. Baker. Complaint, ¶ 20 and Exhibit A. Because Mr. Gabbert recognized that the request for the production of documents potentially implicated Ms. Baker's fifth amendment right against compulsory self-incrimination, Mr. Gabbert prepared a motion to quash the subpoena. Complaint, ¶ 20. Defendant Conn refused Mr. Gabbert's request that Ms. Baker's grand jury appearance be continued for one week in order to allow the appropriate litigation of the constitutional issues presented in the motion to quash. Complaint ¶ 21. On Friday afternoon, March 18, Mr. Gabbert's *ex parte* motion for an order shortening the time within the motion to quash could be heard was denied. Complaint, ¶ 23.

On Friday evening, defendants Conn, Najera, and Zoeller appeared at Ms. Baker's home with a search warrant for the same documents sought by the grand jury subpoena. Complaint, ¶ 24. When the search of Ms. Baker's home failed to reveal the wanted evidence they sought, the defendants embarked on the course of illegal conduct which forms the basis of this lawsuit.

On Monday morning, just before Ms. Baker was to appear before the grand jury, defendant Conn falsely represented to Mr. Gabbert that he was preparing a proposed immunity agreement for Ms. Baker to review. Complaint, ¶¶ 30-33. What the defendants were actually doing was obtaining a search warrant for Mr. Gabbert. Complaint, Exhibit C at p. 54-55. The warrant affidavit contained misstatements regarding an exchange Mr. Gabbert had with defendant Conn as to what documents Mr. Gabbert then had in his possession. Shortly thereafter, armed with an illegally obtained warrant, the defendants repeatedly, searched Mr. Gabbert's belongings, including his attorney-client privileged files. Complaint, ¶ 29 and Exhibit C at pp. 54-55.

At the direction of defendants Conn, Najera and Zoeller, defendant Elliot Oppenheim was appointed as a special master to conduct the search of Mr. Gabbert, pursuant to California Penal Code § 1524. Defendant Oppenheim initiated the search of Mr. Gabbert. Defendants Conn, Najera and Zoeller participated in a second search of Mr. Gabbert's privileged files. Complaint, ¶¶ 8, 34-36. Penal Code § 1524 contains comprehensive statutory mandates designed to protect against the disclosure of privileged attorney-client materials. Complaint, ¶ 35. The searches conducted by the defendants violated substantially all of section 1524's provisions. Complaint, ¶¶ 35-46.

Furthermore, the timing of the searches was carefully and strategically orchestrated by the defendants to coincide with Ms. Baker's appearance before the grand jury. Thus, although Ms. Baker attempted to seek her attorney's counsel during the course of her testimony, she was

prevented from doing so because Mr. Gabbert was being illegally detained and searched in a separate room. Complaint, ¶¶ 37, 43.

As clearly demonstrated below, the defendants' conduct was in obvious derogation of Mr. Gabbert's – and Ms. Baker's – constitutional rights.

III

ARGUMENT

A. THE CONDUCT OF DEFENDANTS CONN AND NAJERA WAS THE PROXIMATE CAUSE OF THE CONSTITUTIONAL VIOLATIONS SUFFERED BY MR. GABBERT

Defendants contend that they cannot be held liable for the civil rights violations alleged by Mr. Gabbert because they did not personally participate in the acts which caused them. Defendants' contention flies in the face of logic and binding Ninth Circuit precedent, as even the cases cited by the defendants reveal.

Plaintiff readily concedes that *respondeat superior* liability is not available under section 1983. However, "personal participation is not the only predicate for section 1983 liability." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981). To the contrary,

> [t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know

> would cause others to inflict the constitutional injury.

Id. Thus, a prosecutor who directs illegal activity is liable under section 1983 even if he did not personally perform the illegal acts. *In re Scott County Master Docket*, 618 F.Supp. 1534, 1554 (D.Minn. 1985), *rev'd sub. nom. in part on other grounds, Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987); *citing Robichaud v. Ronan*, 351 F.2d 533, 537 (9th Cir. 1965). It defies credulity for the defendants to suggest that they were not participants in the conduct alleged here. In reality, defendants Conn and Najera were intimately involved with and, in fact, planned and directed each stage of the events which resulted in the constitutional violations suffered by Mr. Gabbert and Ms. Baker.

It is apparent the defendants were personally involved in the initial stages of the investigation. Defendant Conn supplied defendant Zoeller with the basis for the probable cause necessary to obtain a search warrant for Ms. Baker's home. Complaint, Exhibit B at p. 38. Defendants Conn and Najera participated in the search of Ms. Baker's home. Complaint, ¶¶ 24-26. Moreover, defendants Conn and Najera attempted to question Ms. Baker during the search, despite knowing that she was represented by an attorney who could not be reached. Complaint, ¶ 26. Indeed, defendant Conn asked Ms. Baker several questions about her relationship with her attorney. *id.*

Defendants Conn and Najera's personal involvement in the investigation escalated as the illegal course of conduct began in earnest. As detailed in the Complaint,

on the morning of Ms. Baker's scheduled grand jury appearance, defendants Conn and Najera approached Mr. Gabbert and Ms. Baker while they were waiting in the grand jury anteroom. Mr. Gabbert told defendants that he had with him the motion to quash the grand jury subpoena he attempted to file the previous Friday. Complaint, ¶¶ 28-29. Defendant Conn discussed a possible grant of immunity for Ms. Baker and agreed to have a draft letter of immunity prepared while Mr. Gabbert waited. Complaint, ¶ 30-31. The immunity discussion was a purposefully orchestrated ruse devised by the defendants in order to stall for time while they had defendant Zoeller apply for a search warrant for Mr. Gabbert. Complaint, ¶ 34 and Exhibit C at p. 54.

The defendants caused defendant Oppenheim to be appointed as a special master, pursuant to Penal Code § 1524, to search Mr. Gabbert's belongings. Complaint, ¶ 34. Oppenheim, an agent of defendants Conn and Najera, initiated the search of Mr. Gabbert. Complaint, ¶¶ 8, 42. Over plaintiff's repeated objections, defendant Oppenheim searched Mr. Gabbert's attorney-client privileged files. Complaint, ¶ 42. Almost simultaneous with the commencement of the search, defendant Conn began his questioning of Ms. Baker before the grand jury, knowing her attorney would be unavailable to her. Complaint, ¶ 37. Defendants Conn and Najera intentionally separated Ms. Baker from her lawyer so that Ms. Baker would be unable to consult with Mr. Gabbert as to whether she should assert her fifth amendment privilege against self incrimination in response to questions from the grand jury. Complaint, ¶¶ 37, 43.

Midway through Ms. Baker's testimony, defendant Conn left the grand jury room and told Mr. Gabbert that defendant Zoeller was going to conduct an additional search of Mr. Gabbert, because he was advised by defendant Oppenheim that nothing contained in Mr. Gabbert's files was privileged. Complaint, ¶ 44. Defendant Conn denied Mr. Gabbert's request that the second search be delayed until Mr. Gabbert's attorneys could be present. *Id.* The second search was entirely gratuitous since Mr. Gabbert had already given defendant Oppenheim the only document in his possession within the scope of the warrant. Complaint, ¶ 40. Defendants Conn and Najera participated in the second search and viewed the contents of Mr. Gabbert's privileged correspondence file relating to Ms. Baker. Complaint, ¶ 45.

In the face of these allegations, the defendants' contention that they did not participate in the conduct forming the basis of this lawsuit is unsupportable. Not only did they personally participate in a substantial portion of the conduct alleged, but at all times they were also directing the activities of defendants Zoeller and Oppenheim. It is an absolute distortion of the realities of law enforcement procedure to suggest that defendants Zoeller and Oppenheim acted on their own initiative in this matter. Defendants Conn and Najera, the supervising district attorneys in the case, strategically planned and executed the investigation at every turn and, thus, fully participated in the conduct which resulted in the constitutional deprivations at issue.

B. PROSECUTORS MAY NOT RELY ON ABSOLUTE IMMUNITY WHERE, AS HERE, THEY WERE ENGAGED IN INVESTIGATORY CONDUCT

By its very terms, Section 1983 admits of no immunities. Instead, it imposes liability upon "every person" who under color of state law, deprives another of his civil rights. "[C]ourts are naturally loathe to clothe any person with immunity which would frustrate the statute's design of providing vindication to those wronged by the misuse of state power." *Marrero v. City of Hialeah*, 625 F.2d 499, 503 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *citing Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 1415, 63 L.Ed.2d 673 (1980). The "presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991). As the Supreme Court reaffirmed in *Burns*:

> We have been 'quite sparing' in our recognition of absolute immunity, [ ] and have refused to extend it any 'further than its justification would warrant.'

111 S.Ct. at 1939 (citations omitted); *accord Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993); *Houston v. Partee*, 978 F.2d 362, 365 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1647 (1993) (absolute immunity of 'rare and exceptional character') (citation omitted). The official seeking immunity bears the burden of demonstrating that such immunity is justified. *Burns v. Reed*, 111 S.Ct. at 1939.

In determining whether the particular actions of governmental officials will be accorded absolute or qualified immunity, the Supreme Court has applied a "functional approach." *Burns*, 111 S.Ct. at 1939. This approach looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 545, 98 L.Ed.2d 555 (1988). Thus, the actions of the defendants here are not absolutely immune "merely because they [were] performed by prosecutors." *Buckley*, 113 S.Ct. at 2615. Prosecutors will be granted absolute immunity only where their "activities [are] intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 994, 47 L.Ed.2d 128 (1976). Prosecutors do not receive absolute immunity for those acts performed in their investigative capacity. *Buckley*, 113 S.Ct. at 2626. The courts have observed that,

> a prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court.

Marrero, supra, 625 F.2d at 499; *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987).

The defendants' conduct here falls squarely within the ambit of their roles as investigators, rather than advocates.[1] The single purpose of the defendants' conduct was

---

[1] Defendants' reliance on *Burns v. Reed* to support their assertion that they were acting as advocates is entirely misplaced. In *Burns* the *prosecutor*, not the police officer,

to gather evidence as to Tracy Baker. Indeed, the Complaint is rife with allegations of the defendants' investigatory conduct. For example, defendant Conn advised Mr. Gabbert that Ms. Baker was a target of a grand jury investigation. Complaint. ¶ 17. After Mr. Gabbert moved to quash the subpoena, defendants Conn and Najera executed the search warrant at Ms. Baker's house seeking evidence which would tend to inculpate her in a charge of perjury. Complaint, ¶¶ 16-24. When the defendants did not obtain the evidence they sought at Ms. Baker's home, defendants had a search warrant issued for Mr. Gabbert and Ms. Baker. Complaint, ¶¶ 29-34 and Exhibit C. The affidavit for this warrant contains information supplied by defendant Conn to defendant Zoeller. *Id.* Defendants Conn and Najera participated in the search of Mr. Gabbert, seeking evidence against Ms. Baker. Complaint, ¶¶ 44-45. As the above events reveal, the defendants were continuously engaged in obtaining evidence to use against Ms. Baker. This is quintessential investigative conduct.

As the Supreme Court has held, when prosecutors do not have probable cause to arrest a suspect, in this case Ms. Baker, their conduct in evidence-gathering is deemed

---

appeared before the judge and examined witnesses in order to obtain a search warrant. Indeed, under that jurisdiction's rule, the prosecutor was required to participate in a probable cause hearing to obtain a warrant. It is not disputed that, as the *Burns* Court held, the prosecutors' "appearance in court" and "presentation of evidence at that hearing" would be absolutely immune. 111 S.Ct. at 1942. No such equivalent conduct occurred in the case before this Court.

purely investigatory. *Buckley,* 113 S.Ct. at 2606. In language particularly apt here, the Court in *Buckley* noted that:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'

113 S.Ct. at 2616. Of equal importance, "a prosecutor who directs illegal investigatory activities is not cloaked by absolute immunity even if the prosecutor did not personally perform the proper acts." *In re Scott County Master Docket, supra,* 618 F.Supp. at 1554; *accord, Robichaud v. Ronan,* 351 F.2d 533, 537 (9th Cir. 1965). Similarly, prosecutors are not absolutely immune for the advice they give to law enforcement authorities. *Burns v. Reed,* 111 S.Ct. at 1943-44. Thus, the Supreme Court has recognized, "it would be incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but allow police officers only qualified immunity for following the advice." *Id.* at 1944. The defendants can take no refuge in the fact that defendants Zoeller and Oppenheim performed certain of the acts alleged, when it was the prosecutors who orchestrated the investigation of Tracy Baker and provided advice to defendants Zoeller and Oppenheim as to how to assist in the execution of

that investigation. Defendants Conn and Najera acted as investigators with respect to the section 1983 violations alleged and are not entitled to absolute immunity for those acts.

C. DEFENDANTS CONN AND NAJERA ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS TO MINISTERIAL ACTS

In certain circumstances, government employees may be entitled to qualified immunity for violating an individual's constitutional rights during the performance of their official duties. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). However, it is axiomatic that a defendant will only be shielded from liability in connection with acts undertaken in the performance of discretionary as opposed to ministerial duties. *See Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738; *Anderson v. Creighton,* 483 U.S. 635, 637-38, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Davis v. Holly,* 835 F.2d 1175, 1178 (6th Cir. 1987); *People of Three Mile Island v. Nuclear Regulatory Commissioners,* 747 F.2d 139, 143 (3d Cir. 1984). *See also White By Swafford v. Gerbitz,* 860 F.2d 661, 665 n.4 (6th Cir. 1988), *cert. denied,* 489 U.S. 1028 (1989) (where defendant failed timely to release plaintiff from custody, pursuant to court order, qualified immunity defense not available). As the Third Circuit has stated:

> 'Discretionary-decisional' acts are those which involve significant decision-making that entails personal deliberation, decision and judgment. 'Ministerial-operational' acts involve the execution or implementation of a decision and entail only minor decision-making.

Davis v. Holly, 835 F.2d at 1178 (citations omitted).

In the present case, the defendants are liable for failing to insure that the statutory mandates of California Penal Code § 1524[2] were followed at the time Mr. Gabbert's privileged attorney-client files were searched. Section 1524 provides a comprehensive statutory scheme which was designed to prevent against precisely the type of unfettered, exploratory search of an attorney's files which took place in the present case. Section 1524(c)(2) requires that if an attorney served with a warrant states that an "item or items should not be disclosed, they *shall* be sealed by the special master and taken to court for a hearing." Section 1524(e) further provides that a special master may permit the party serving the warrant to accompany the special master as he or she conducts the search. However, that party "*shall* not participate in the search nor *shall* he or she examine any of the items being searched by the special master except upon agreement of the party upon whom the warrant has been served." Cal. Penal Code § 1524 (emphasis added); Complaint, ¶ 35. In *Geilim v. Superior Court*, 234 Cal.App.3d 166, 285 Cal.Rptr. 602 (1991), the leading case analyzing section 1524, the court made clear that the statute's dictates are mandatory.

---

[2] It is well-established that state statutes may form the basis of a section 1983 action where the violation of state law causes the deprivation of rights protected by the constitution. *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 n.22 (9th Cir.), *cert. denied*, 114 S.Ct. 549 (1993); *Draper v. Coombs*, 792 F.2d 915, 921 (9th Cir. 1986); *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir.), *cert. denied*, 112 S.Ct. 187 (1991). *See also Davis v. Scherer*, 468 U.S. 183, 194 n.12, 104 S.Ct. 3012, 82 L.Ed 2d. 139, *reh. denied*, 468 U.S. 1226 (1984).

As the court noted, its provisions are phrased as "requirements" and the procedures specified "must be followed." 234 Cal.App.3d at 172-73, 285 Cal.Rptr. at 605-607.

The defendants failed to comply with section 1524 and their failure to do so resulted in a violation of Mr. Gabbert's (and his client's) constitutional rights. Mr. Gabbert repeatedly advised the special master conducting the search, defendant Elliot Oppenheim, that his briefcase contained attorney-client and work-product privileged documents. Defendant Oppenheim was required to cease the search and have those documents sealed pursuant to section 1524 in order to prevent the disclosure of privileged information. He failed to do so. Complaint, ¶¶ 35-39. Indeed, although Mr. Gabbert voluntarily gave defendant Oppenheim the only document in his possession responsive to the search warrant, defendant Oppenheim nonetheless continued to search through Mr. Gabbert's attorney-client correspondence files. Most egregiously, defendant Oppenheim read the entire file relating to Tracy Baker. Complaint ¶¶ 40-41.

Moreover, after unilaterally and erroneously deciding, based solely upon defendant Oppenheim's representations that none of the materials in Mr. Gabbert's files contained privileged materials, defendant Conn permitted defendant Zoeller to conduct yet another search of Mr. Gabbert's files in direct and obvious contravention of section 1524. Complaint ¶ 44. Despite Mr. Gabbert's objections, defendants Conn and Najera participated in the second search and also viewed the contents of the Baker file. Complaint, ¶ 45. Section 1524 explicitly prohibits anyone but the special master from conducting a

search unless the person being searched gives their consent. Not only did Mr. Gabbert not consent, he repeatedly objected to the defendants' conduct.

Defendants Conn and Najera's repeated intentional violations of section 1524 resulted in a substantial deprivation of Mr. Gabbert's constitutional rights. First, the defendants' conduct denied Mr. Gabbert his right to be free from unreasonable searches and seizures. Second, the statutory breaches committed by the defendants resulted in a violation of plaintiff's substantive due process rights. That is, the defendants' conduct, in directing, permitting and/or participating in the illegal search of Mr. Gabbert's files, prevented him from effectively representing his clients, most specifically Ms. Baker, who was compelled to testify before the grand jury while her lawyer was being searched in the courthouse hallway. The defendants conduct was in plain derogation of the rights and obligations accorded to Mr. Gabbert, under the fourth, fifth, sixth and fourteenth amendments. Complaint, ¶ 57.

As *Geilim* and the statutory language itself reveal, the defendants here were permitted no discretion in determining whether or how to "execute" or "implement" section 1524 – they were simply required to adhere to its provisions. Accordingly, the defendants may not now cloak themselves with a blanket assertion of qualified immunity with respect to their violations of the statute's provisions.

D. THE CONSTITUTIONAL RIGHTS AT ISSUE WERE CLEARLY ESTABLISHED AT THE TIME OF THE ALLEGED CONDUCT AND THEIR VIOLATION WAS OBJECTIVELY UNREASONABLE

Assuming qualified immunity is available as a potential defense for the defendants' non-ministerial conduct, the following two-part analysis is to be applied: "(l) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Hallstrom, supra,* 991 F.2d at 1482, quoting *Act Up!/Portland v. Bagley,* 988 F.2d 868, 871-72 (9th Cir. 1993). The first inquiry, whether the law is clearly established, "is a pure question of law for the court to decide." *Mendoza v. Block,* 94 Daily Journal D.A.R. 5022, 5024, F.3d (9th Cir. 1994). Contrary to the defendants' assertions, however, judicial determination with respect to the second inquiry is not automatic. The factual issues necessarily involved in the reasonableness inquiry cannot be resolved in the context of the motion before the Court.[3]

For qualified immunity purposes, the Supreme Court has held that "the contours of the right at issue must be

---

[3] Where, as here, material issues of fact are in dispute, such as to "the facts and circumstances within an [official's] knowledge" or "what the [official] and claimant did or failed to do," the case must proceed to a jury. *Act Up!,* 988 F.2d at 873; *Sloman v. Tadlock,* 21 F.3d 1462, 1467 (9th Cir. 1994). As the Ninth Circuit stated in *Sloman,* "evaluating the reasonableness of human conduct is undeniably within the area of jury competence." "[T]he jury is best suited to determine the reasonableness of an officer's conduct in light of the factual context in which it takes place." 21 F.3d 1468.

sufficiently clear that . . . a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). This standard "does not mean that any official action is protected by qualified immunity 'unless the very action in question has previously been held unlawful. . . .' " *Mendoza v. Block, supra*, 94 Daily Journal D.A.R. at 5024, *quoting Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039. As the *Mendoza* court recognized, an official is "not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." 94 Daily Journal D.A.R. at 5024. The Ninth Circuit has further held that, in the absence of clear precedent, this Court "should look to whatever decisional law is available to ascertain whether the law is clearly established. . . . "*Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). Such "available law" includes state court decisions, as well as cases from other federal circuits and districts. *Id.; Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

Substantially all of the circuits acknowledge that, insofar as section 1983 "may offer the only realistic avenue for vindication of constitutional guarantees," Harlow, *supra*, 457 U.S. at 814, 102 S.Ct. at 2736, "insisting on precise factual correspondence between the conduct at issue and reported case law is tantamount to permitting officials one liability-free violation of a constitutional or statutory right." *People of Three Mile Island v. Nuclear Recrulatory Commissioners, supra*, 747 F.2d at 145. Thus, many courts have required that officials know and apply

general legal principles. *Id.* at 144 ("requiring officials to consider the legal implications of their actions should have a salutary effect"). *See also, Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) (official may not take solace in ostrichism; asserted ignorance cannot provide a doctrinal safe harbor) and *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 & n.37 (10th Cir. 1989), *cert. denied*, 112 S.Ct. 296 (1991) (*Harlow* qualified immunity standard cannot become an insuperable barrier; structuring clearly established inquiry too narrowly would render officials immune in all but the rarest cases).

1. The First Claim For Relief – Fourth Amendment Violations

Plaintiff's first claim is grounded in the fourth amendment's proscription against unreasonable searches and seizures. This claim has three components: 1) the warrant was obtained in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); 2) the warrant's execution was impermissibly broad and general, and 3) the defendants violated Penal Code § 1524 when Mr. Gabbert was searched.[4] Complaint, ¶ 50. Mr. Gabbert's constitutional rights with respect to each of these components were clearly established at the time of the searches at issue.

---

[4] The Penal Code § 1524 violations are discussed at length in Section III C, above. Plaintiff will not repeat those arguments again here, but instead incorporates them by reference.

a. The Warrant Affidavit Contained Material Misstatements of Fact

For almost 20 years, it has been bedrock constitutional law that the fourth amendment "requires [that a warrant affidavit contain] a truthful factual showing sufficient to constitute probable cause." *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985). Thus, pursuant to the Supreme Court's holding in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978),

> If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, not only is his conduct the active cause of the illegal [search] but he cannot be said to have acted in an objectively reasonable manner.

Olson, 771 F.2d at 281. (footnotes omitted). It is similarly well established that the *Franks* rule is to be applied with equal force in section 1983 cases and criminal suppression hearings. *Id.*; *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994); (*Bivens* action); *Golino v. City of New Haven*, 761 F.Supp. 962, 968 (D.Conn.), *aff'd.*, 950 F.2d 864 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 3032 (1992); *Willocks v. Dodenhoff*, 110 F.R.D. 656, 659 (D.Conn), *aff'd.*, 805 F.2d 392 (2d Cir. 1986) ("constitutional rights should be applied congruently in criminal suppression hearings and section 1983 damage actions); *Ogden v. District of Columbia*, 676 F.Supp. 324, 326 (D.D.C. 1987), *aff'd.*, 861 F.2d 303 (D.C. Cir. 1988).

In the present case, the warrant affidavit contains two material misstatements of fact without which the search warrant for Mr. Gabbert and his belongings could not have issued. To begin with, the warrant affidavit claims that:

> This morning [March 18, 1994] in the Criminal Courts Building, Mr. Gabbert informed Deputy District Attorney David Conn that he has all the documents referred to in this warrant in his possession and on his person.

Complaint, Exhibit C at p. 54.[5] The affidavit further claimed that Judge Bascue had previously denied Mr. Gabbert's motion to quash the subpoena which sought the identical documents as the search warrant. *Id.* at p. 55. Both of these statements were false and defendants Conn and Najera knew they were false.[6]

Mr. Gabbert never advised defendant Conn that he had the documents sought by the grand jury subpoena and search warrant "in his possession and on his person." What he did tell defendant Conn on the morning of March 18th was that he had with him the papers relating to the motion to quash the grand jury subpoena. Complaint, ¶ 29. Furthermore, Judge Bascue did not deny Mr.

---

[5] Material such as the subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994).

[6] As discussed in Section III A, *supra*, it is apparent from the language of the affidavit itself that defendants Conn and Najera directed, supervised and/or participated in the preparation of the warrant affidavit and are therefore responsible for the misstatements contained therein.

Gabbert's motion to quash; he only denied the *ex parte* application for an order shortening the time within which the motion to quash could be heard. *Id.* In fact, Mr. Gabbert specifically showed both defendants Conn and Najera Judge Bascue's order to this effect. *Id.* Disregarding the truth, defendants Conn and Najera supplied false information to defendant Zoeller in order to obtain a warranty to search Mr. Gabbert. Without these two critical factual elements, a magistrate would have no basis to believe the documents sought by the warrant would be found on Mr. Gabbert's person or in his briefcase, and would not have issued a warrant.[7]

b. Assuming, Arguendo, That The Warrant Affidavit Was Valid, The Execution Of The Warrant Was Impermissibly General And Broad

If a warrant sufficiently describes the area to be searched, it may justify a search of the personal effects

---

[7] Even assuming a heightened pleading standard exists for *Franks* violations in civil rights cases, *see Branch v. Tunnell*, 14 F.3d at 452, plaintiff has met that standard here. That is he has alleged (1) the portion of the warrant claimed to be false, (2) facts tending to show the defendants were aware of the falsity, and (3) that the false statements were necessary to a finding of probable cause. *Id.*; Complaint, ¶¶ 29, 50, 51. It is worth noting that in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), the Supreme Court specifically held that a heightened pleading standard more stringent than the requirements of Fed.R.Civ.Proc. 8(a) could not be applied in civil rights cases alleging municipal liability. The Court did not consider the permissibility of heightened pleading requirements in cases involving individual government officials because that issue was not before the Court.

located within that area. It is, however, indisputable that in order to search such personal effects, they must be legitimately capable of containing the items described in the warrant. *United States v. Disla*, 805 F.2d 1340, 1346 (9th Cir. 1986); *see also United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984); *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir.), *cert. denied*, 484 U.S. 837 (1987); 2 W.R. LaFave, *Search & Seizure* § 410(b) & (d) at pp. 317 & 324-25 (1987 ed.). In other words, one cannot search for an elephant in a match box.

In the present case, the warrant authorized a search for correspondence between Tracy Baker and Lyle Menendez. In purported reliance on the warrant, two searches of Mr. Gabbert were conducted. The first search, conducted by defendant Oppenheim, as directed by defendants Conn and Najera, was of Mr. Gabbert's files, briefcase and the contents contained therein. The second search, conducted by all of the defendants, was of Mr. Gabbert's attorney-client files.

Even assuming the first search of Mr. Gabbert's files was in compliance with section 1524, the defendants were not entitled to search through many of the other items contained in his briefcase which could not have contained the correspondence sought. In particular, defendant Oppenheim searched Mr. Gabbert's pocket-book/wallet; his calendar, which contained extensive handwritten notes, including client names, addresses and telephone numbers; a tablet of paper, which contained a list of client names with corresponding billing information; and his eye-glass case. Complaint, ¶¶ 41-42. While it might be reasonable to assume that a file folder would contain

correspondence, it is unreasonable to expect that an attorney's wallet, calendar or eye-glass case would contain several pages of correspondence. The search of these items was constitutionally impermissible, as the defendants reasonably should have been aware.

The second search of Mr. Gabbert was also unreasonable in that repetitive searches are not permissible without additional authority. 2 W.R. La Fave, *Search & Seizure* § 4.10(d). The additional searches of Mr. Gabbert's files by defendants Zoeller, Conn and Najera, *see Complaint*, ¶¶ 44-45, were not authorized by the warrant or section 1524. In fact, both the warrant and the statute explicitly prohibited the additional searches. That is, the warrant plainly states that the search of Mr. Gabbert was to be conducted "through Special Master Elliot Oppenheim." Complaint, Exhibit C at p. 44. Moreover, section 1524 states that no one other than the special master shall "examine any of the items being searched . . . except upon agreement of the party upon whom the warrant has been served." Penal Code § 1524(e); Complaint, ¶ 35. Under these circumstances, the repetitive searches of Mr. Gabbert were objectively unlawful.

2. The Second Claim For Relief – Substantive Due Process

A claim for substantive due process may form the basis for a section 1983 claim. *See, e.g. Cooper v. Dupnik*, 963 F.2d 1220, 1245-48 (9th Cir.), *cert. denied*, 113 S.Ct. 407 (1992); *Harrington v. Almy*, 977 F.2d 37, 43 (1st Cir. 1992). In *Rochin V. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209,

96 L.Ed. 183 (1952) the Supreme Court held that substantive due process is violated when the government engages in activities which "shock the conscience." *Rochin* outlawed all government conduct that "offend(s) those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses." *Cooper v. Dupnik*, 963 F.2d 1248-49, *quoting Rochin*, 342 U.S. at 169, 72 S.Ct. at 208. Phrased another way, "malicious, irrational and plainly arbitrary actions are not within the purview of the state's power." *Sinaloa Lake Owner's Ass'n v. City of Simi Valle*, 882 F.2d 1398, 1409 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

The Supreme Court has not articulated specific standards for identifying what constitutes a substantive due process claim. *Cooper*, 963 F.2d at 1249. Thus, the Ninth Circuit has recognized that determining whether particular conduct "shocks the conscience" is necessarily a fact intensive issue. *Id.* While noting that substantive due process claims most frequently arise in police brutality cases, the courts in both *Cooper, supra*, and *Wood v. Ostrander, supra*, concluded that excessive force is merely an example of such a violation, but by no means exhausts the possibilities. *Cooper*, 963 F.2d at 1249; *Ostrander*, 879 F.2d at 589. Thus, to establish a substantive due process claim, plaintiff is not required to point to a prior holding on the same facts. *See Bonitz v. Fair*, 804 F.2d 164, 172 and n.9 (1st Cir. 1986) (specific judicial articulation of right not required; to require prior holding on specific facts would actually reward the government for inventing ever more egregious conduct.) and *Cannon v. Macon County*, 1 F.3d 1558, 1564-65 (11th Cir. 1993), *mod. on reh'g*, 15 F.3d

1022 (1994) (requiring prior holding on materially similar facts "would add an unwarranted degree of rigidity to the law of qualified immunity") (citation omitted).

There are several elements to Mr. Gabbert's substantive due process cause of action. Complaint, ¶ 57. The constitutional underpinning of each of the discrete claims is that the searches at issue, particularly their manner, timing and execution, violated Mr. Gabbert's sixth amendment right and obligation to effectively represent, assist and counsel his client, Tracy Baker. Furthermore, as a concomitant of the violation of his sixth amendment rights, Ms. Baker's constitutional right to counsel, right to privacy and right against self-incrimination were also violated. The separate elements of plaintiff's substantive due process claim will be addressed below.

a. The Defendants' Conduct Impermissibly Intruded Into Plaintiff's Relationship With His Clients In Violation Of The Sixth Amendment And Mr. Gabbert Has Standing To Challenge Those Violations

1) Standing

The sixth amendment right to assistance of counsel is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.' " *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932), *quoting Herbert v. Louisiana*, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270 (1926). The concept of the right to counsel is necessarily included in the concept of due process of law. *Powell*, 287 U.S. at 67; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 403 (1963). *See also United States v. Flanagan*, 679 F.2d 1072, 1075 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984) (defendant's decision to select attorney protected by sixth amendment and fifth amendment due process clause); *accord, Davis v. Stamler*, 650 F.2d 477, 479-80 (3d Cir. 1981). A necessary component of the right to counsel is the right to *effective* assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984); *Keker v. Procunier*, 398 F.Supp. 756, 675 (E.D. Cal. 1975); *Poe v. United States*, 233 F.Supp. 173 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

The "mirror image of the client's right to effective assistance of counsel is the attorney's right to practice his profession" according to the highest standards of that profession and without governmental interference. *Keker*, 398 F.Supp. at 756; *Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation*, 507 F.2d 1281, 1284 (8th Cir. 1974); *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir.), *cert. denied*, 419 U.S. 891 (1974) (physician's right to practice profession or engage in occupation). As the court in Keker pointed out,

> the foundation of the legal practice is the right to maintain privacy and freedom from intrusion essential to the attorney-client relationship.

398 F.Supp. at 761. Thus, because an attorney's interest in vindicating his right to practice his chosen profession is "so closely linked with the rights of the client," an attorney has standing to assert the sixth amendment rights of his client. *Keker*, 398 F.Supp. at 765 ("vindication of one right is consequently dependent on vindication of the other"); *Wounded Knee*, 507 F.2d at 1284.

2) The Governmental Intrusion

As established above, "[i]t is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his sixth amendment right to counsel." *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980); *see also United States v. Johnson*, 818 F.Supp. 1004, 1006 (S.D. Texas 1993). Here, the defendants have unconstitutionally intruded into Mr. Gabbert's relationship with his clients, especially as to Ms. Baker, in myriad ways.

First, defendants Conn, Najera and Zoeller repeatedly questioned Ms. Baker, without Mr. Gabbert being present, but fully knowing that Mr. Gabbert represented Ms. Baker. Complaint, ¶¶ 18, 24, 26. It is well established that California's Rule of Professional Conduct 2-100, which prohibits an attorney from contacting a represented party without the consent of their counsel, is binding on prosecutors. *See United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993); *People v. Sharp*, 150 Cal.App.3d 13, 197 Cal.Rptr. 436 (1983); *People v. Manson*, 61 Cal.App.3d 102, 132 Cal.Rptr. 265, 301 (1976), *cert. denied*, 430 U.S. 986 (1977) (prosecutor held to ethical rules because he "is not less a member of the State Bar than any other admitted lawyer"). Furthermore, at least two circuits have recognized that Rule 2-100's prohibition against communicating with represented parties can apply to pre-indictment situations and implicate sixth amendment concerns. *United States v. Lopez*, 4 F.3d at 1461 (a prosecutor is bound by Rule 2-100 at the moment of indictment at the very latest); *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871

(1990). The Ninth Circuit concluded that adherence to Rule 2-100 is necessary because:

> the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition. As a result, uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case, for our adversary system is premised upon functional lawyer-client relationships.

989 F.2d at 1036.

Second, defendants intentionally waited to serve Mr. Gabbert with the search warrant for his person and belongings until the precise moment in time that his client was about to appear before the grand jury. Complaint, ¶¶ 34-46. Indeed, in order to detain Mr. Gabbert so that the warrant could be issued before Ms. Baker commenced her grand jury testimony, defendants Conn and Najera falsely told Mr. Gabbert that they were having a letter prepared for Mr. Gabbert's review which would contain a proposed grant of immunity for Ms. Baker. Complaint, ¶ 33. An immunity letter was never provided to Mr. Gabbert. Instead, he was served with a search warrant. Complaint, ¶ 34.

It is constitutionally repugnant that Ms. Baker was compelled to appear before the grand jury while her lawyer was being detained by law enforcement authorities. As a result of defendants' conduct, when Ms. Baker requested to consult with her attorney, just prior to entering the grand jury room, she was prevented from obtaining his advice as to whether to assert her fifth

amendment privilege against self-incrimination because he was in another room being illegally searched. Complaint, ¶ 37. Despite both Mr. Gabbert's and Ms. Baker's protestations, Ms. Baker was ordered into the grand jury room. *Id.* In addition, during the course of her grand jury testimony, Ms. Baker asked to consult with her attorney. She was prevented from doing so until the search of Mr. Gabbert was completed. Complaint, ¶ 43. Mr. Gabbert was denied his right and obligation to provide his client with assistance of counsel. Ms. Baker was denied the advice of her counsel. A more fundamental and intentional intrusion into the attorney-client relationship cannot be imagined.

Third, the defendants' failure to adhere to the statutory mandates of Penal Code § 1524 violated the privacy rights of Ms. Baker, as well as the rights of other clients of Mr. Gabbert. As detailed above, rather than sealing the attorney-client privileged files in Mr. Gabbert's possession, defendants arbitrarily rifled through them and read portions of the documents contained therein. The Ninth Circuit has spoken loudly, in language particularly applicable here, with respect to this type of violation:

> It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney. Neither the State of California, where the search took place, Congress nor the federal courts dispute this hornbook rule.[8]

---

[8] It is also hornbook law that an attorney has standing to raise the attorney-client privilege on behalf of his client. *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976);

DeMassa v. Nunez, 770 F.2d 1505, 1507 (9th Cir. 1985). The expectation of a client's right to privacy in attorney-client files has its "source in federal and state statutes, in codes of professional responsibility, under common law and in the United States Constitution. *Id.* The sixth amendment provides a "source" and "understanding" of this expectation of privacy to the extent that effective assistance of counsel is at stake. *Id.* Moreover, "[b]ecause the Fifth Amendment's protection against testimonial self-incrimination may be threatened by the act of disclosure of legal files, that constitutional guarantee also supports the client's legitimate expectations of privacy." *Id.*

Because of the defendants' capricious conduct, Ms. Baker's privacy rights were violated, as well the rights of all of the other clients whose files were in Mr. Gabbert's possession at the time of the searches. In addition, Mr. Gabbert's own privacy rights were violated insofar as his attorney work-product was contained in the files searched. The search of his personal belongings, such as his calendar and wallet further violated his privacy rights of even greater significance, however, because of the defendants failure to follow a law specifically designed to protect against the kind of unprofessional and illegal conduct that occurred here, Mr. Gabbert was rendered impotent to protect the confidences with which his clients

---

United States v. King, 536 F.Supp. 253 (C.D. Cal. 1982) (fact that client is not a party to proceeding is irrelevant to issue of standing). *See also DeMassa v. Nunez*, 770 F.2d at 1506 (unlike fourth amendment rights which are personal, privacy rights may be vicariously asserted).

had entrusted him. Such conduct cannot be countenanced by a federal court.

c. As a Matter of Law, the Defendants' Violations Of Mr. Gabbert's Substantive Due Process Rights Cannot Be Deemed Reasonable.

On their face, the defendants multiple violations of Mr. Gabbert's substantive due process rights cannot, under any set of circumstances, be deemed reasonable for qualified immunity purposes. Moreover, the defendants should not be permitted even to raise the defense of qualified immunity as a potential bar to plaintiff's substantive due process claim. This is because, in practical terms, a "reasonableness" analysis is irrelevant where the standard governing the conduct at issue is whether it "shocks the conscience." Plainly, conduct which is so violative of the constitution that it "shocks the conscience" cannot, *a fortiori*, be reasonable – these are mutually exclusive concepts. *See Skelofilax v. Quigley*, 586 F.Supp. 532, 543 (D. N.J. 1984) (where conduct is found to have "shocked the conscience" defendants not entitled to qualified immunity as a matter of law).

As one author has observed:

> To the extent that the plaintiff must prove a due process or cruel and unusual punishment violation, the immunity defense surely would be inappropriate. Proof of severe injury, malice, or conduct that shocks the conscience is thoroughly inconsistent with the notion of objectively reasonable or good faith conduct.

See Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force, 62 Temp. L.Q. 61, 97-98 (1989) (contending that "malicious conduct is per se objectively unreasonable for the purpose of qualified immunity").

Indeed, several circuits have ruled that qualified immunity is not an appropriate defense in excessive force cases. *See Street v. Parham*, 929 F.2d 537 (10th Cir. 1991) (error to allow jury to consider qualified immunity in excessive force case); *Williams-El v. Johnson*, 872 F.2d 224 (8th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Bates v. Jean*, 745 F.2d 1146, 1152 (7th cir. 1984); *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988); *Fernandez v. Leonard*, 784 F.2d 1209, 1217 (1st Cir. 1986), *aff'd. on appeal*, 963 F.2d 459 (1992); *Stevens v. Corbell*, 832 F.2d 884 (5th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Vizbaras v. Prieber*, 761 F.2d 1013, 1018-19 (4th Cir. 1985) (Winter, J., concurring and dissenting), *cert. denied*, 474 U.S. 1101 (1986); and *Clark v. Beville*, 730 F.2d 739, 740 (11th Cir. 1984). Such analysis is consistent with the Ninth Circuit's resolution of the qualified immunity issue in excessive force cases. *See, e.g. Cooper v. Dupnick, supra*, 963 F.2d at 1251 (where legal standards governing substantive due process claim were well established and conduct alleged shocked the conscience, qualified immunity not available as defense) and *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir.), *cert. denied*, 112 S.Ct. 582 (1991). (defendants allowed to raise qualified immunity defense where actions were "unreasonable in all circumstances, but below the level that shocks the conscience") The defendants' conduct here shocks the conscience and they should, therefore, be precluded from asserting a qualified immunity defense.

IV

CONCLUSION

For the foregoing reasons, defendants' plaintiff Paul L. Gabbert respectfully requests that this Court deny defendants' Motion to Dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6) in its entirety.

DATED: August 26, 1994

Respectfully submitted,

MICHAEL J. LIGHTFOOT
CARLA M. WOEHRLE
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE
WOEHRLE & SADOWSKY

/s/ Melissa N. Widdifield
By: MELISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

(VERIFICATION – 446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA, COUNTY OF _____

I, the undersigned, declare: I am the _____

_____

in the above-entitled action; I have read the foregoing

_____

and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters. I believe it to be true.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____

Date Type or Print Full Name of Declarant and if applicable Signature of Declarant

---

(PROOF OF SERVICE BY MAIL – 1013a, 2015.5 C.C.P)

STATE OF CALIFORNIA COUNTY OF LOS ANGELES

I am a resident of [sic] employed in the aforesaid county, State of California: I am over the age of eighteen (18) years and not a party to the within action: my business address/residence address is: 655 SOUTH HOPE STREET, 13th FLOOR LOS ANGELES, CA 90017. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service, and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business on AUGUST 26, 1994 19___. I served the foregoing PLAINTIFF GABBERT'S OPPOSITION TO DEFENDANTS' CONN AND NAJERA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. PROC. 12(b)(6); MEMORANDUM OF POINTS & AUTHORITIES (set forth the exact time of the document served) on DEFENDANTS in this action by placing a true copy thereof, enclosed in a sealed envelope on this date at LOS ANGELES (place of business where the correspondence was placed for deposit in the United States Postal Service) California and placed for collection and mailing on this date following ordinary business practices addressed as follows

SEE ATTACHMENT

I certify (or declare) under penalty of perjury under the laws of the State of California, that the foregoing is true and correct

AUGUST 26, 1994 JUDY A. ALLEN (Date and Name of Declarant)

/s/ Judy A Allen
Signature of Declarant

ATTACHMENT

Elliott A. Oppenheim
1215 Beverly Estate Terrace
Beverly Hills, CA 90210

Kevin C. Brazile (BY PERSONAL SERVICE)
Principal Deputy County Counsel
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert Plaintiff, vs. David Conn, et al Defendant.	CASE NUMBER CV CV 94-4227-ABC(Ex) **ORDER TO REASSIGN CASE** (Filed Jul. 8, 1994)

The undersigned Judge, to whom the above-entitled case was assigned pursuant to General Order 224, being of the opinion that he should not try said case, by reason of

My former position as Assistant District Attorney during the prosecution of this case

hereby orders the case reassigned by the Clerk in accordance with General Order 224, or other applicable rule or order of this Court (28 U.S.C. §137); and

IT IS FURTHER ORDERED that the Clerk serve copies of this Order forthwith by United States mail on counsel for all parties appearing in this case.

Dated: July 7, 1994

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES
DISTRICT JUDGE

NOTICE TO COUNSEL FROM CLERK:

This case has been reassigned to Judge RONALD S. W. LEW. On all documents subsequently filed in this case, please substitute the initials RSWL after the case number in place of the initials of the prior judge so that the case number will read CV 94-4227 RSWL (Ex).

This is very important because documents are routed to the assigned judges by means of the initials.

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendants.	CASE NO. CV 94-4227 RSWL (Ex) DEFENDANTS CONN AND NAJERA'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS (Filed Sep. 1, 1994) DATE: SEPTEMBER 19, 1994 TIME: 9:00 A.M. COURTROOM: "21"

TO PLAINTIFF AND YOUR ATTORNEYS OF RECORD:

Defendants David Conn and Carol Najera hereby submit the attached Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss.

Dated: August 31, 1994

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy/County Counsel

Attorneys for Defendants
CONN and NAJERA

MEMORANDUM OF POINTS AND AUTHORITIES

I. DEFENDANTS CONN AND NAJERA ARE IMMUNE FROM LIABILITY BECAUSE THEY DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF PLAINTIFF.

To overcome defendants Conn and Najera's affirmative defense of qualified immunity plaintiff must prove that the constitutional right allegedly violated was clearly established at the time of the officials allegedly impermissible conduct. *See Camarillo v. McCarthy* 998 F.2d 638, 639 (9th Cir. 1993); *Romero v. Kitsap County* 931 F.2d 624, 626 (9th Cir. 1991). A right is "clearly established" when the contours of the right are sufficiently clear that a reasonable official would understand that what he or she is doing violates the law. *See Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 3099, 97 L.Ed.2d 523 (1987); *Camarillo v. McCarthy* id. at page 640.

According to the complaint, the rights of plaintiff that defendants allegedly violated were guaranteed by the Fourth and Sixth amendment. However, a review of the complaint and plaintiff's opposition papers reveals that plaintiff's Fourth and Sixth amendment rights were not violated by defendants Conn and Najera.

A. PLAINTIFF'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES WAS NOT VIOLATED BY DEFENDANTS.

The Fourth Amendment protects the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. *See U.S. v. Attson* 900 F.2d 1427, 1429 (9th Cir. 1990). However, the law is well established that a search warrant may be used to gather evidence of a crime. *See U.S. v. McLaughlin* 851 F.2d 283, 286 (9th Cir. 1988). Furthermore, the courts have held that there is no fourth amendment violation by officials who conduct a search pursuant to a facially valid warrant. *See Mills v. Graves* 930 F.2d 729, 731-732 (9th Cir. 1991).

Plaintiff challenges the warrant relied upon by defendants on the ground that the affidavit in support of the warrant contained false facts. *See Franks v. Delaware* 438 U.S. 154 (1978). According to the opposition papers the warrant affidavit, which was prepared by detective Leslie Zoeller, contained two (2) material misstatements of fact. Nevertheless, the *Franks* doctrine is not violated where there is sufficient content in the affidavit, apart from the

challenged material, to support a finding of probable cause. *See Mills v. Graves* id. at page 733.

A review of the affidavit submitted by defendant Zoeller in support of the warrant shows that notwithstanding the *alleged* false statements made by Conn, there were sufficient facts contained in the affidavit to state a substantial basis for a finding of probable cause. *See e.g. Mills v. Graves* id. at page 733. For example, at page 7 of detective Zoeller's affidavit, he states that Tracy Baker informed him that the primary object of the search warrant (correspondence) existed and was turned over to attorney Paul L. Gabbert. In addition, plaintiff was the attorney for Ms. Baker and when he accompanied Ms. Baker to the Criminal Courts Building he had several documents in his possession as well as a briefcase.

Since the affidavit of defendant Zoeller, notwithstanding the alleged false statements of defendant Conn, established probable cause to search plaintiff's belongings the warrant was valid. In otherwords, there was no violation of plaintiff's Fourth Amendment Rights because the warrant was supported by probable cause. *See U.S. v. Johns* 948 F.2d 599, 606 (9th Cir. 1991) (The government need not include all of the information in its possession to obtain a search warrant and the affidavit need only show facts adequate to support a finding of probable cause); *See also U.S. v. Garza* 980 F.2d 546, 550-551 (9th Cir. 1992).

To summarize, defendants Conn and Najera did not violate plaintiff's Fourth Amendment rights nor any other clearly established law because both searches of plaintiff were made pursuant to a valid search warrant.

Hence, when the Special Master (Oppenheim) conducted the first search of plaintiff, outside of Conn's and Najera's presence, neither Conn nor Najera violated plaintiff's Fourth Amendment Rights. As for the second search conducted by detective Zoeller and only *observed* by defendants Conn and Najera, neither Conn nor Najera violated any clearly established right of plaintiff, because once again the search was pursuant to valid warrant. Therefore, since the searches were conducted pursuant to a valid warrant, which is evident from the warrant affidavits attached to the complaints, defendants Conn and Najera should be granted qualified immunity to any Fourth Amendment based claim of plaintiff.

B. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE PLAINTIFF'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED.

Plaintiff makes the claim in his opposition papers that his client's Sixth Amendment rights were violated by the searches conducted on *him* pursuant to the facially valid search warrants. However, Plaintiff cannot base his Section 1983 claims on the violation of his client's Sixth Amendment right to Effective Assistance of Counsel, because a plaintiff in a Civil Rights Action brought under 42 U.S.C. Section 1983, only has standing to assert a violation of his *own* legal rights or interest. *See Warth v. Seldin* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975) (Plaintiff must assert his own legal rights and cannot rest his claim to relief on the legal rights and interests of third parties); In accord, *see Secretary of State of Md. v. Joseph H. Munson Co.* 467 U.S. 947, 955; 104 S.Ct.

2839, 2846, 81 L.Ed.2d 786 (1984). *See also Rose v. City of Los Angeles,* 814 F.Supp. 878, 881 (C.D. Cal. 1993) (Federally protected rights that are enforceable under Section 1983 are personal to the injured party, and therefore, a Section 1983 claim must be based on the violation of plaintiff's personal rights, and not the rights of someone else.)

To the extent plaintiff bases his Section 1983 claims on the alleged violation of his client's (Tracy Baker) Sixth Amendment right to effective assistance of counsel, defendants Conn and Najure [sic] are entitled to qualified immunity, because plaintiff lacks standing to predicate his Section 1983 claim on the alleged violation of a third party's rights.[1] Moreover, since plaintiff lacks standing to raise his client's Sixth Amendment rights, he also lacks standing to assert a violation of the privacy rights of Ms. Baker or his other clients, as the basis for his Section 1983 claims, because he sustained no harm or injury by the alleged violation of his client's privacy rights. *See e.g., Conti v. City of Freemont,* 919 F.2d 1385, 1388 (9th Cir. 1990) (owner of entertainment business lacked standing to assert his patrons rights); *Darring v. Kincheloe,* 783 F.2d 874, 877-78 (9th Cir. 1986) (State prisoner who suffered no injury lacked standing to assert violation of other inmates' constitutional rights). It should also be noted that plaintiff lacks standing to base his Section 1983 claim on an alleged violation of his client's (Tracy Baker) Fifth Amendment Right against self-incrimination.

---

[1] Plaintiff's client, Tracy Baker, is not a party to the instant action.

Plaintiff cannot cogently argue that the searches somehow violated his own Sixth Amendment right to counsel, because the right to counsel does not attach until, "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. "*See Kirby v. Illionis* [sic], 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972); *Strandberg v. City of Helena,* 791 F.2d 744, 747 (9th Cir. 1986). Thus, since plaintiff was never charged or arrested his Sixth Amendment rights were not violated.

II. DEFENDANTS' FAILURE TO ENSURE THAT PENAL CODE SECTION 1524 WAS COMPLIED WITH CONSTITUTES ONLY NEGLIGENCE.

In *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986), the Supreme Court held that negligence is not cognizable under the civil rights act, by stating:

> "Where a government official's act causing injury to life, liberty or property is merely negligent, no procedure for compensation is constitutionally required."

In accord with the case of *Daniels v. Williams, Id.,* is the companion case of *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), where the court ruled at page 670, as follows:

> "In *Daniels,* we held that the Due Process clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. In other words, where a government official is

> merely negligent in causing the injury, no procedure for compensation is constitutionally required."

Plaintiff contends in his opposition papers at page 15, that defendants are liable under Section 1983 for:

> "failing to ensure that the statutory mandates of California Penal Code Section 1542 were followed at the time Mr. Gabbert's privileged attorney-client files were searched."

Any failure by either Conn or Najera to "ensure" that defendants Oppenheim and Zoeller fully complied with Penal Code Section 1524 constitutes nothing more than negligence, which is not cognizable under Section 1983. Furthermore, defendants Conn and Najera cannot be held liable for Special Master Oppenheim's alleged failure to comply with Penal Code Section 1524, because they were not even present when he searched plaintiff. *See Palmer v. Anderson,* 9 F.3d 1433, 1438 (9th Cir. 1993) (No vicarious liability under Section 1983). Moreover, defendant Conn cannot be liable for failing to prevent detective Zoeller from searching plaintiff's files because, once again, vicarious liability does not apply to a Section 1983 claim.

The mere fact that defendants Oppenheim and Zoeller allegedly violated Penal Code Section 1524, does not, standing alone, constitute a Section 1983 claim, because Section 1983 claims must be predicated on the violation of a *specific* federal constitutional right. *See Strandberg v. City of Helena,* 791 F.2d 744, 748 (9th Cir. 1986) (a Section 1983 claim must be based upon a specific constitutional guarantee); *Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 624 (9th Cir. 1988) (To make out a cause of action under Section 1983, plaintiff must plead

. . . that defendants deprived plaintiff of rights secured by the constitution or federal statutes). Although plaintiff alleges that a few procedural requirements of Penal Code Section 1524 were violated, the Complaint fails to specify or articulate what federal rights were violated by the failure of others to comply with a few procedural provisions of a state law. Consequently, to the extent plaintiff's Section 1983 claim is based upon the violation of a state law it is not cognizable. *See* e.g. *Clark v. Link,* 855 F.2d 156, 161-163 (4th Cir. 1988) (defendants entitled to qualified immunity if Section 1983 action based solely on violation of state law.)

DATED: **August 31, 1994**

DE WITT W. CLINTON
County Counsel

By: /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County Counsel

Attorneys for Defendants
CONN and NAJERA

PROOF OF SERVICE

STATE OF CALIFORNIA)
) s.s.
COUNTY OF LOS ANGELES)

I am employed in the County aforesaid; I am over the age of eighteen and not a party to the within action; my business address is 500 West Temple Street, Los Angeles, California 90012.

On September 1, 1994, 1 served the within *DEFENDANTS CONN AND NAJERA'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS* in the case of *Paul L. Gabbert v. David Conn, et al.* **Case No. CV 94-4227 RSWL (Ex)** by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in a United States mail box in Los Angeles, California, addressed as follows:

Melissa N. Widdifield
TALCOTT, LIGHTFOOT,
VANDEVELDE
655 South Hope Street
13th Floor
Los Angeles, California 90017

Elliot A. Oppenheim
1215 Beverly Estate Terrace
Beverly Hills, Ca. 90210

and that the person on whom said service was made has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of September, 1994 at Los Angeles, California.

/s/ BARBARA J. HOLMES
BARBARA J. HOLMES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert Plaintiff, vs. David Conn, Carol Najera, Elliot Oppenheim, Leslie Zoeller and Does 1 through through [sic] X Defendants	)	CV 94-4227-RSWL (Ex) **ORDER** (Filed Sept. 30, 1994)

Two of the defendants in the above captioned action, David Conn and Carol Najera, have moved to dismiss Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defendants Conn and Najera base their Fed. R. Civ. P. 12(b)(6) motion to dismiss on, alternatively: absolute immunity; qualified immunity; and lack of causation. The matter was set for oral argument on September 19, 1994, but was removed from the Court's law and motions calendar pursuant to Fed. R. Civ. P. 78, for disposition based on the papers filed.

Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of

1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.[1] While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliot Oppenheim.[2] Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42 U.S.C. § 1983,[3] claiming constitutional violations

---

[1] Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

[2] Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524 (c) (1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

[3] 42 U.S.C. § 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or

including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at face value. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied* 454 U.S. 1031, 102 S. Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *see also, NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453

---

causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. *Id.* at 454.

B. Defendants Conn and Najera's First Ground For Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *Id.* Absolute immunity is given sparingly. *Id.*

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 411, 431, 96 S. Ct. 984, 995 (1976). In determining a prosecutor's immunity, the court looks at the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are

entitled to absolute immunity when performing those functions. *Id.*, However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions – i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The *Buckley* Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S. Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." *Burns*, 111 S. Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants conduct was to gather evidence." Opp. at 12. Defendants' purpose, however, is not the issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. *Imbler*, 424 U.S. at 432, 96 S. Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the

initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. *Id.* As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." *Id.* Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' Conn and Najera delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that Conn and Najera were present when Plaintiff was served with the search warrant, and that Conn introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that Conn and Najera were present for the second search and viewed Plaintiff's documents during the search, after Conn informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, the Court finds

that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those reasons, the Court **DENIES** Defendants Conn and Najera's claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government officials.

Alternatively, Defendants Conn and Najera move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the importance of resolving immunity questions as early as possible in litigation. *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991).

1. Plaintiff's Conduct was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the search of Plaintiff was conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (noting that "although Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment"). Thus, Plaintiff's argument that Defendants

have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis.

The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was unlawful. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (*citing Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. *Id.* at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways:

a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 claim

Vicarious liability is not a basis for a § 1983 claim. *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional conduct must be the proximate cause of the deprivation. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were

not only present at the search but also "viewed" documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, sixth amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid Warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to an evidentiary hearing on the validity of the warrant. The *Franks* standard also defines the scope of qualified immunity in civil rights actions. *Branch v. Tunnell*, 937 F.2d

1382, 1387 (9th Cir. 1991) (*Branch I*) (citing *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as *Franks* requires. 438 U.S. at 171, 98 S. Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under *Franks* excuses the inaccuracies. *Id.* at 171-72, 98 S. Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.[4] The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is likewise valid. The search was not clearly unlawful on the grounds of an invalid warrant, and under *Harlow*, Conn and Najera are entitled to qualified immunity on the

---

[4] The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*Branch II*).

charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's first search violated the fourth amendment because the search went beyond the scope of the warrant.[5] He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir. 1987); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). The warrant in question was for "correspondence." By definition, correspondence may include letters and notes on small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet,

[5] The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under *Harlow*.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired).

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under *Kaplan*. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The second search, like the first search, therefore does not meet the *Harlow* test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. *Long v. Norris*, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established *federal law. Elder v. Holloway*, ___ U.S. ___, 114 S. Ct. 1019, 1023 (1994) (unanimous decision).

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. *Dorr v. County of Butte*, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise His Client's Sixth Amendment Claim

Plaintiff has standing to assert his client Baker's sixth amendment claim[6] under Wounded Knee Legal Defense/Offense Com. v. *FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

---

[6] The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Governmental interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); *see United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir. 1979). Plaintiff makes no allegation that his client was

substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference[7] with Plaintiff's representation of his client was unlawful. Under *Harlow*, Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. Conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that

> While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This rule has been found to apply to prosecutors pursuing a criminal case. *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under

---

[7] Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

United States v. Irwin, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.[8] "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992) (quoting *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation. *Partington*, 961 F.2d at 863; *Clutchette*, 770 F.2d at 1471 (citing *United States v. Irwin*).

---

[8] Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. *DeMassa v. Nunez*, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendant's alleged interference with the attorney-client privilege. Thus, under *Harlow*, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his profession. Such a right has been found to exist. *Keker v. Procunier*, 398 at 756; *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. *Kecker* [sic], 398 F. Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the *Harlow* test,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the *unlawfulness must be apparent*.

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during his search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss, the Court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment right to practice his profession free from undue governmental interference. The Court thus **DENIES** Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of substantive due process claim has most often been

invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. *Cooper v. Dupnik*, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. *Id.* The Court finds here that Defendants' alleged conduct was not so lacking in decency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

Leave to amend need not be granted if the court determines that allegation of other facts consistent with the challenged pleading could not correct the deficiency. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his second claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Conn and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client privilege, violations of Cal. Rule Prof. Conduct 2-100, and

violations of Cal. Penal Code § 1524 are **DISMISSED WITH PREJUDICE. IT IS SO ORDERED.**

RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

DATED: September 27, 1994

CV 94-4227-RSWL *Galbert v. Conn, Najera et al.*, Defendants Conn and Najera' 12(b)(6) motion to dismiss.

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendants
DAVID CONN and CAROL NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X, Defendants.	CASE NO. CV 94-4227-RSWL (Ex) **ANSWER TO COMPLAINT BY DAVID CONN AND CAROL NAJERA** **DEMAND FOR JURY TRIAL**

Defendants, DAVID CONN and CAROL NAJERA, for themselves alone, separating themselves from all other defendants, answer plaintiff's unverified complaint, and admit, deny and allege as follows:

1. Defendants admit the allegations contained in paragraphs 3 and 27 of plaintiff's complaint.

2. Defendants lack sufficient information or belief to admit or deny the allegations contained in paragraphs 4, 5, 6, 7, 8, 9, 12, 14, 15, 19, 20, 21, 22, 23, 24, 28, 30, 31, 32, 33, 34, 34(a), (b), (c), 35, 36, 37 and 47 of the complaint, and based on said lack of information or belief defendants deny each and every allegation contained therein.

3. Defendants deny generally and specifically each and every allegations [sic] contained in paragraphs 1, 2, 10, 11, 13, 16, 17, 18, 25, 25(a), (b), (c), (d), (e), 26, 29, 38, 39, 40, 41, 41(a), (b), (c), (d), (e), (f), 42, 43, 44, 45, 46, 48, 50, 50(a), (b), (c), 51, 52, 53, 54, 55, 57, 57(a), (b), (c), (d), (e), (f), 58, 59, 60, 61 and 62 of the complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

4. Defendants CONN and NAJERA are immune from civil rights liability under the doctrine of qualified immunity.

SECOND AFFIRMATIVE DEFENSE

5. Defendants CONN and NAJERA are immune from civil rights liability under the doctrine of quasi-judicial immunity.

THIRD AFFIRMATIVE DEFENSE

6. Defendants CONN and NAJERA are immune from civil rights liability because their acts were objectively reasonable and did not violate any clearly established federal law.

FOURTH AFFIRMATIVE DEFENSE

7. The defendants are immune from liability under the doctrine of official immunity.

FIFTH AFFIRMATIVE DEFENSE

8. The facts alleged in the Complaint do not involve any custom, practice, procedure or regulation of the defendants County of Los Angeles.

SIXTH AFFIRMATIVE DEFENSE

9. Defendants are not liable for damages under the Federal Civil Rights Act for negligence.

SEVENTH AFFIRMATIVE DEFENSE

10. Any and all official conduct taken by defendants was in good faith and without malicious intent to deprive plaintiff of his constitutional rights or to cause him other injury.

EIGHTH AFFIRMATIVE DEFENSE

11. Defendants acted at all times in good faith and with the reasonable belief their actions were valid.

NINTH AFFIRMATIVE DEFENSE

12. Plaintiff's causes of action under the Federal Civil Rights Act are barred as the Complaint fails to raise facts that go beyond mere tortious conduct and rise to the

dignity of a violation of a Federal Constitutional or statutory right.

TENTH AFFIRMATIVE DEFENSE

13. Plaintiff's alleged injuries were not proximately caused by any policy, custom, practice, procedure or regulation promulgated or tolerated by defendant County of Los Angeles.

ELEVENTH AFFIRMATIVE DEFENSE

14. These answering defendants were not the proximate cause of plaintiff's alleged deprivation of a constitutionally protected right, privilege or immunity.

TWELFTH AFFIRMATIVE DEFENSE

15. Plaintiff's complaint fails to state a cause of action against these answering defendants for, under *Monell v. Department of Social Services for the City of New York*, 436 U.S. 658 (1978), there can be no recovery for federal civil rights violations where there is no constitutional deprivation occurring pursuant to governmental custom.

THIRTEENTH AFFIRMATIVE DEFENSE

16. Plaintiff's attempt to recover punitive damages violates these answering defendants' constitutional rights to due process of law and protection from "excessive fines".

FOURTEENTH AFFIRMATIVE DEFENSE

17. A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person except as otherwise provided by statute.

FIFTEENTH AFFIRMATIVE DEFENSE

18. Plaintiff has failed to avoid or mitigate the alleged injuries and/or damages alleged in the Complaint and thus, any recovery should be reduced accordingly.

SIXTEENTH AFFIRMATIVE DEFENSE

19. Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against these answering defendants.

SEVENTEENTH AFFIRMATIVE DEFENSE

20. The County of Los Angeles is not liable for an injury resulting from the act or omission of one of its employees where the employee is immune from liability pursuant to Government Code Section 815.2(b).

EICHTEENTH AFFIRMATIVE DEFENSE

21. Any and all acts or omissions of these answering defendants' agents or employees which allegedly caused the injury at the time and place set forth in the Complaint were the exercise of discretion vested in them and therefore there is no liability pursuant to Government Code Section 820.2.

NINETEENTH AFFIRMATIVE DEFENSE

22. A public employee is not liable for injury caused by his instituting or prosecuting any judicial proceeding within the scope of his employment pursuant to Government Code Section 821.6.

TWENTIETH AFFIRMATIVE DEFENSE

23. Defendant County of Los Angeles, its agents, officers an/or [sic] employees at no time assumed the duty and/or responsibility for conducting an investigation into the circumstances giving rise to plaintiff's injuries.

WHEREFORE, Defendants pray that:

1. Plaintiff take nothing by this action;

2. Defendants be awarded their costs of this suit; and

3. Defendants be awarded such other relief as the Court may deem just and proper.

DATED: October 17, 1994

DE WITT W. CLINTON
County Counsel

By: /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
DAVID CONN and CAROL NAJERA

DEMAND FOR JURY TRIAL

Defendants, DAVID CONN and CAROL NAJERA, hereby demand a jury trial of all issues of fact properly triable by jury.

DATED: October 17, 1994

DE WITT W. CLINTON
County Counsel

By: /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendants
DAVID CONN and CAROL NAJERA

NAME, ADDRESS and TELEPHONE NUMBER of ATTORNEY(S):

DE WITT W. CLINTON, County Counsel
KEVIN C. BRAZILE, Principal Deputy C. C.
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorney(s) for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff(s) vs. DAVID CONN, et al. Defendant(s)	CASE NUMBER CV 94-4227-RSWL (Ex)

PROOF OF SERVICE

ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On October 17, 1994 I served a true copy of:

___ ANSWER TO COMPLAINT BY DAVID CONN AND CAROL NAJERA; DEMAND FOR JURY TRIAL

___ _____

___ _____

___ by personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

X by depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Michael J. Lightfoot, Esq.
Carla M. Woehrle, Esq.
Melissa N. Widdifield, Esq.
Talcott, Lightfoot, Vandevelde, Woehrle & Sadowsky
655 South Hope Street, 13th Floor
Los Angeles, CA 90017

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on October 17, 1994, at Los Angeles, California.

** ___ I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.

** X I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

/s/ Kiyoko Wald
Signature of person making service
KIYOKO WALD

ACKNOWLEDGEMENT OF SERVICE

I, _____, received a true copy of the within document on _____, 1994.

_____
(Signature)

for _____
(Party Served)

_____

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBRAGE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendants.	CASE NO. CV 94-4227 RSWL (Ex) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW; DECLARATIONS AND EXHIBITS IN SUPPORT OF MOTION (Filed Aug. 31, 1995) DATE: SEPTEMBER 25, 1995 TIME: ~~10:00~~ A.M. 9:00 COURTROOM:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case(s) Page(s)

Statutes

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendants.	CASE NO. CV 94-4227 RSWL (Ex) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW; DECLARATIONS AND EXHIBITS IN SUPPORT OF MOTION DATE: SEPTEMBER 25, 1995 TIME: 9 ~~10:00~~ A.M. COURTROOM:

TO PLAINTIFF AND YOUR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on September 25, 1995, at 9 ~~10:00~~ a.m. in the Courtroom of the Honorable Ronald Lew, which is located at 312 North Spring Street, Los Angeles, California, Defendants David Conn and Carol Najera shall move for Summary Judgment to the above-entitled action on the grounds of: (1) qualified immunity; (2) absolute prosecutorial immunity; and (3) insufficient evidence for equitable relief.

This Motion for Summary Judgment shall be based upon this notice; the attached Memorandum of Points and Authorities; Separate Statement of Uncontroverted Material Facts and Conclusions of Law; Declarations, Exhibits, pleadings and files of this action and any other matter the court deems appropriate.

Dated: September 1, 1995

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County Counsel

Attorneys for Defendants
CONN AND NAJERA

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On June 23, 1994, plaintiff Paul Gabbert filed a federal civil rights action under 42 U.S.C. § 1983 against defendants David Conn, Carol Najera, Elliot Oppenheim and Leslie Zoeller. On August 5, 1994, defendants David Conn and Carol Najera filed a Motion to Dismiss plaintiff's action pursuant to Federal Rule of Civil Procedure 12(b)(6). On September 30, 1994, this court issued an order, which granted in large part, defendant's Conn and Najera's Motion to Dismiss. A true and correct copy of the court's September 30, 1994, order is attached hereto and incorporated herein by reference as Exhibit "1". The factual background of this case is set forth in this court's

order of September 30, 1994, at page 2, and therefore, defendants will adopt the court's statement of facts for purposes of this Motion.

Since this Court's order of September 30, 1994, granted in large part defendant's Motion to Dismiss, the sole and remaining claim in this action is plaintiff's fourteenth amendment right to practice his profession free from undue governmental interference. *See* Exhibit "1" at page 20.

II. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO QUALIFIED IMMUNITY TO PLAINTIFF'S FOURTEENTH AMENDMENT CLAIM.

It is well settled that the defense of qualified immunity protects government officials performing discretionary functions from liability for civil damages when their conduct does not violate clearly established law that a reasonable person could have known. *See Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Shoshone-Bannock Tribes v. Fish & Game Comm. Idaho* 42 F.3d 1278, 1285 (9th Cir. 1994). Regardless of whether a constitutional violation occurred a government official should prevail under the qualified immunity defense if the right asserted by the plaintiff was not clearly established or if the official could have reasonably believed that his or her conduct was lawful. *See Romero v. Kitsap County* id. at page 627; *Hemphill v. Kincheloe* 987 F.2d 589, 591-593 (9th Cir. 1993); *Armendariz v. Penman* 31 F.3d 860, 864-865 (9th Cir. 1994).

When the defendant raises the affirmative defense of qualified immunity, the initial burden is upon the plaintiff to show that the rights were clearly established, after

which the defendant bears the burden of proving that his conduct was reasonable. *See Romero v. Kitsap County* id. at page 627; *Shoshone-Bannock Tribes v. Fish & Game Comm. Idaho* id. at page 1285.

In *Romero v. Kitsap County* id. at page 627, this Circuit set forth the three (3) inquiries necessary for the determination of qualified immunity,[1] by stating:

> "The qualified immunity test necessitates three inquires: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue."

A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. *See Seigert v. Gilley* 500 U.S. 226, 232 (1991); *Armendariz v. Penman* id. at page 865.

A. DEFENDANTS CONN AND NAJERA DID NOT VIOLATE ANY CLEARLY ESTABLISHED LAW.

A right is clearly established for qualified immunity purposes if the contours of the right are sufficiently clear

---

[1] *See also Shoshone-Bannock Tribes v. Fish & Games Comm. Idaho* id. at page 1285;

that a reasonable official would understand that what he is doing violates the law. *See Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Aldrich v. Knal* 858 F.Supp. 1480, 1500 (W.D. Wash. 1994); *Camarillo v. McCarthy* 998 F.2d 638, 639 (9th Cir. 1993). To determine whether a right is clearly established in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts[2]. *See Romero v. Kitsap County* 931 F.2d 624, 629 (9th Cir. 1991); *Ward v. County of San Diego* 791 F.2d 1329, 1332 (9th Cir. 1986). However, for qualified immunity purposes, a right must be clearly established in a particularized and relevant sense. *See Block v. Mendoza* 27 F.3d 1357, 1360 (9th cir. 1994). Thus, although the very action in question need not have previously been held unlawful, the unlawfulness must be *apparent* in light of preexisting law. *See Block v. Mendoza* 27 F.3d 1357, 1360, (9th Cir. 1994); *Anderson v. Creighton* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Maciariello v. Summer* 973 F.2d 295 298 (4th Cir. 1992) (officials are not liable for bad guesses in gray areas; they are only liable for transgressing bright lines).

In order for the plaintiff to carry his burden that defendants Conn and Najera violated his clearly established rights he must show that the illegality of the challenged conduct was clearly established in factual circumstances that are closely analogous to this action. *See Richardson v. Oldham* 12 F.3d 1373, 1381 (5th Cir. 1994).

---

[2] However, a single District Court decision does not clearly establish the law. *See Hawkins v. Steingut* 829 F.2d 317, 321 (2nd Cir. 1987).

Hence, the plaintiff must demonstrate that, by the time in question, there were fairly analogous precedents establishing that defendants conduct violated the law. *See Horta v. Sullivan* 4 F.3d 2, 13 (1st Cir. 1993).

A review of the undisputed facts in this action clearly shows that defendants Conn and Najera did not violate any of plaintiff's clearly established constitutional rights. The gist of plaintiff's fourteenth amendment claim of interference with his right to practice profession is that he was searched by Defendant Oppenheim while his client was testifying before the grand jury.

One reason why the fact that Oppenheim searched plaintiff when his client was testifying before the grand jury is not a violation of any clearly established law is because plaintiff did not have a right to be present in the grand jury hearing room when his client, Tracy Baker, testified. For example, under California law a witness testifying before the Los Angeles County grand jury is not entitled to have counsel present. *See People v. Dale* (1947) 79 Cal.App.2d 370, 376 ("It is clear that one who is being investigated by a grand jury is not entitled to be represented by counsel before that body); and in accord, *see Clark v. Superior Court* (1961) 190 Cal.App.2d 739, 742. It is also the rule in California that anyone subpoenaed to testify before the grand jury cannot have an attorney present when he or she testifies at the grand jury. *See Farnow v. Superior Court* (1990) 226 Cal.App.3d 481, (Judicial Commissioner was not allowed to have counsel present when he testified before the County grand jury). *See also* California Penal Code Section 939.

The federal courts have also held that there is no right to counsel before the grand jury. *See Brewer v. Williams* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (The sixth amendment right to counsel does not attach at the grand jury stage); *U.S. v. Mandujano* 425 U.S., 564, 583, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212 (1976) ("under settled principles the witness may not insist upon the presence of his attorney in the grand jury room or examine other witnesses).

Since neither plaintiff nor his client had a constitutional right to have counsel present in the grand jury room when Tracy Baker testified, defendants Conn and Najera did not violate any clearly established law when they participated in the grand jury proceeding at the same time that plaintiff was being searched by Defendant Oppenheim. Moreover, Plaintiff has conceded in his deposition that he knew beforehand that he would not be allowed to accompany his client or be present in the grand jury hearing room when she testified. *See* Uncontroverted Material Fact No. 3. Plaintiff also concedes that defendants Conn and Najera did not participate in the first search conducted by Oppenheim and that Conn and Najera were not present when plaintiff was subjected to the first search by Oppenheim. *See* uncontroverted Fact Nos. 7-10. In addition, it should be noted that plaintiff contends that the only time he was prevented from giving legal advice to his client was when he was being searched by Oppenheim. *See* Fact 21.

There exists no binding case precedent that an attorney's fourteenth amendment right to practice his profession without interference is somehow violated when he is subjected to a search, pursuant to a valid warrant and by

a special master, while his client is testifying before the grand jury.[3] Furthermore, there is no case law that is analogous to the present action, so that it would have been apparent and clear to defendants Conn and Najera that they somehow committed a constitutional violation by examining Tracy Baker before the grand jury while her counsel, Paul Gabbert, was being searched pursuant to a valid search warrant.

Another reason why Conn and Najera did not violate any clearly established law is because plaintiff was given access to his client by both Conn and Najera. To illustrate, when Tracy Baker was called before the grand jury she advised Defendant Najera that she wasn't able to speak with her attorney because, "he's still with the special master". *See* Exhibit "2" at page 25. Next, she asked permission to confer with plaintiff for a moment, and therefore, the foreperson of the grand jury allowed Ms. Baker to leave the grand jury hearing room to speak with her attorney. *See* Exhibit "2" at page 25.

When Ms. Baker returned to the grand jury room after apparently speaking with her attorney she exercised her fifth amendment right against self incrimination, and then asked to confer with her counsel again. *See* Exhibit "2" at page 26. Consequently, the foreperson of the grand jury once again granted her request to speak with her counsel. *See* Exhibit "2" at pages 26-27. Upon her return to the grand jury room Ms. Baker, upon the advise [sic] of

---

[3] The present action is factually distinguishable from *Keker v. Procunier* 398 F.Supp. 756, 761 (E.D. Cal; 1975), which involved a prison environment and where the inmates Sixth Amendment Rights were applicable.

counsel, again exercised her fifth amendment right against self-incrimination. *See* Exhibit "2" at page 27. Thereafter, defendant Najera asked Ms. Baker if she brought the documents specified in the subpoena, and in response Ms. Baker asked to confer once more with her attorney. *See* Exhibit "2" at page 27. Thus, a 10-minute recess was taken and Ms. Baker was excused to consult with her attorney. *See* Exhibit "2" at pages 28-29. After the recess Ms. Baker returned to the grand jury hearing room, wherein she was advised by the grand jury foreperson, to go to Dept. 110 of the Superior Court for a contempt proceeding. *See* Exhibit "2" at pages 30-31.

The contempt proceeding was conducted on March 21, 1994, at 11:40 a.m. in Department 110. *See* Exhibit "2" at page 33. Plaintiff represented his client at the contempt proceedings at all times. *See* Exhibit "2" at pages 35-36.

There is no binding case precedent to support the proposition that a prosecutor who is conducting a grand jury examination of a witness, and then allows the witness to consult with her attorney, upon the witnesses's request, by leaving the grand jury room, somehow violates the witnesses' attorney's constitutional rights. Moreover, there is no analogous case precedent that even suggests that a prosecutor commits a constitutional violation by *granting* a grand jury witness's request to confer with her attorney. Hence, in light of the absence of binding or analogous case precedent that the conduct of Conn and Najera was unlawful, then neither Conn nor Najera knowingly violated clearly established law. *See Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995) (qualified immunity gives ample room for mistaken judgments by

protecting all but the plainly incompetent or those who knowingly violate the law).

The facts of the case at bar are somewhat analogous to the case of *In Re Grand Jury Proceedings of John Doe v. U.S.* 842 F.2d 244 (10th Cir. 1988). In *John Doe*, a fifteen (15) year old minor was held in contempt for refusing to testify before the grand jury. The minor contended that his Sixth Amendment rights were violated by the Court refusing to permit his counsel to be present in the grand jury room or to permit the minor to write down the questions and come out after each question and be advised by his attorney. The Tenth Circuit held that the minor's Sixth Amendment rights were not violated because the prosecutors did not refuse to permit the minor to confer with his counsel outside the grand jury room and because the minor was not denied access to his attorney in the hallway.

In Comparison to the *John Doe* case, here Defendants Conn and Najera did not refuse or deny Ms. Baker's requests to leave the grand jury room or to consult with her attorney. In addition, Conn and Najera did not deny Ms. Baker access to her attorney who was in an adjacent area. Since both Conn and Najera allowed Ms. Baker to leave the grand jury room to consult with her attorney each time she made such a request, and because plaintiff was nearby at all times, defendants Conn and Najera did not violate any clearly established law.[4]

---

[4] Plaintiff alleges that he was only denied access to his client and prevented from giving her legal advice during the search conducted by Oppenheim, which occurred while Conn and Najera were before the Grand Jury. *See* Uncontroverted Facts 19 and 21.

Unless plaintiff can articulate some pre-existing and clearly established law that Conn and Najera violated, then both Conn and Najera are entitled to qualified immunity.

B. THE CONDUCT OF CONN AND NAJERA WAS OBJECTIVELY REASONABLE.

The rule of qualified immunity provides ample support to all but the plainly incompetent or those who knowingly violate the law. *See Burns v. Reed* 500 U.S. 478, 494-495, 111 S.Ct. 1934, 114 L.Ed 2d 547 (1991); *Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995). Therefore, regardless of whether the constitutional violation occurred, a government official is immune from civil rights liability if he or she could have reasonably believed that his or her particular conduct was lawful. *See Romero v. Kitsap County* 931 F.2d 624, 627 (9th Cir. 1991); *Schroeder v. McDonald* 55 F.3d 454, 461 (9th Cir. 1995); *Armendariz v. Penman* 31 F.3d 860, 864-865 (9th Cir. 1994).

A review of the undisputed facts shows that the conduct of defendants Conn and Najera was objectively reasonable in light of pre-existing law. For example, according to plaintiff there was only one (1) occasion that he was denied access to his client, which was when he was being searched by Special Master Oppenheim.[5] *See* Uncontroverted Material Fact No. 19. Plaintiff also alleges that the only occasion he was prevented from giving legal advice to Tracy Baker was when he was searched by

---

[5] The search conducted by Oppenheim was the first search conducted on plaintiff on March 21, 1994.

Oppenheim. *See* Uncontroverted Material Fact No. 21. Furthermore, it is undisputed that the only participants in the first search were Oppenheim and plaintiff. *See* Uncontroverted Material Fact Nos. 7-10. Finally, it is uncontroverted that during all or most of the first search both Conn and Najera were before the grand jury examining Tracy Baker. *See* Exhibit "2"; and declarations of David Conn and Carol Najera.

Since Conn and Najera were before the grand jury when the first search was being conducted, and because as a matter of law, plaintiff was not allowed to be present in the grand jury room, then neither Conn nor Najera denied plaintiff access to his client during the first search. Moreover, Conn and Najera did not prevent plaintiff from giving legal advice to his client, because each time Tracy Baker made a request to seek the advice of or confer with her counsel she was allowed to do so. *See* Exhibit "2" at pages 25, 26, and 27. It should also be noted that each time Baker returned to the Grand Jury room after being excused to confer with her counsel, she asserted her fifth amendment right against self-incrimination, *on the advice of counsel,* and she never advised anyone in the grand jury or prosecutors Conn and Najera, that she had not conferred with her attorney. *See* Exhibit "2" at pages 25-29.

Due to the fact Tracy Baker always invoked her fifth amendment right on the advice of counsel and because each request she made to confer with her attorney was granted, it was objectively reasonable for Conn and Najera to believe that Tracy Baker had consulted with her attorney. *See* declarations of Conn and Najera. The only reasonable conclusion to be drawn from the Grand Jury

transcript (Exhibit "2"), of Tracy Baker's testimony is the one (1) drawn by Conn and Najera; specifically, that Tracy Baker had conferred with her attorney each time she asked to do so.

Thus, the Grand Jury transcript (Exhibit "2") clearly supports Conn and Najerals objective belief that plaintiff was not denied access to her attorney, because each time she asserted her fifth amendment rights she did so upon the advice of counsel. Therefore, it was reasonable for Conn and Najera to believe that plaintiff was never denied access to his client. *See* Declarations of Conn and Najera.

Even if one were to conclude that Conn and Najera deprived plaintiff of a clearly established right when he was searched by Oppenheim, the conduct of Conn and Najera was objectively reasonable in light of clearly established law for the following reasons: (1) each request by Tracy Baker to confer with plaintiff was granted; (2) Tracy Baker never advised anyone that she did not confer with her attorney; and (3) she indicated that she had consulted with her attorney by asserting her fifth amendment privilege on the advice of counsel. *See e.g. In Re Grand Jury Proceedings of John Doe v. U.S.* 842 F.2d 244, 248 (10th Cir. 1988).

Turning now to the second search conducted by Leslie Zoeller, both plaintiff and Tracy Baker alleged that it lasted about five (5) minutes. *See* Uncontroverted Material Facts nos. 17 and 33. Furthermore, it is undisputed that Tracy Baker was present during most if not all of the second search. *See* Uncontroverted Material Facts nos. 16, 30, 32 and 33. It is also uncontroverted that the second

search commenced *after* Tracy Baker's grand jury testimony ended. *See* Uncontroverted Material Fact No. 32. Moreover, immediately after the second search plaintiff conferred with his client. *See* Uncontroverted Material Fact No. 20 and 49.

Since the grand jury testimony of Baker was in recess when the second search began, and because plaintiff conferred with his client after the second search and represented her at the contempt proceeding, the conduct of Conn and Najera was objectively reasonable. Lastly, due to the fact that plaintiff concedes he was not denied access to his client nor prevented from giving her legal advice after the first search, any conduct of Conn and Najera related to the second search was objectively reasonable and within the ambit of qualified immunity.

III. DEFENDANTS CONN AND NAJERA ARE ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY WITH REGARD TO THE FIRST SEARCH OF PLAINTIFF.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 123 (1976), the U.S. Supreme Court established the rule that prosecutors are entitled to absolute immunity from liability under the Civil Rights Act, 42 U.S.C. Section 1983, for any acts or omissions performed within the course and scope of their authority or closely associated with the criminal process. In *Imbler*, plaintiff, who was convicted of murder, brought a civil rights action under 42 U.S.C. Section 1983 against the prosecuting attorney on the grounds that the prosecutor knowingly used false testimony and suppressed material evidence in

order to convict plaintiff of murder. The issue before the court in *Imbler* was whether a prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution could be held liable under Section 1983. The Court held that the prosecutor was entitled to absolute immunity for both initiating and pursuing the criminal prosecution, by stating:

> "We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force . . . We hold only that in initiating a prosecution and presenting the state's case, the prosecutor is immune from a civil suit for damages under § 1983."

In *Burns v. Reed*, 500 U.S. ___, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), the court held that a prosecutor has absolute immunity from liability for damages under 42 U.S.C. Section 1983 for participating in a probable cause hearing. In *Burns*, the prosecutor participated in a probable cause hearing where he examined a witness and successfully supported an application for a search warrant. The Supreme Court held that the foregoing activities of the prosecutor fell within the bounds of absolute prosecutorial immunity, by stating at page 1942 as follows:

> "The prosecutor's actions at issue here – appearing before a judge and presenting evidence in support of a motion for a search warrant – clearly involve the prosecutor's role as advocate for the state, rather than his role as administrator or investigative officer . . .

> 'Moreover, since the issuance of a search warrant is unquestionably a judicial act, appearing at a probable cause hearing is intimately associated with the judicial phase of the criminal process . . . ' Accordingly, we hold that respondent's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity."

In *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2615, 125 L.Ed 2d 209 (1993), the Supreme Court once again held that a prosecutor is entitled to absolute immunity when acting as an advocate for the state, preparing for trial or seeking an indictment before a grand jury, by stating:

> "We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made."

In determining whether a particular act or conduct of a prosecutor is entitled to absolute immunity or qualified immunity the Supreme Court has applied a functional approach which looks to the nature of the function performed, not the identity of the actor who performed it. *See Buckley v. Fitzsimmons* id. 113 S.Ct. at page 2613. Thus, whenever a prosecutor's function is an advocate for the

state or closely associated with the judicial process, absolute prosecutorial immunity applies. *See Buckley v. Fitzsimmons* id. 113 S.Ct. at page 2613-2616.

In the instant action, defendants Conn and Najera were before the grand jury examining Tracy Baker when plaintiff, Paul Gabbert, was being searched by Special Master Elliott Oppenheim. *See* Uncontroverted Material Facts 7-10. It is also undisputed that neither Conn nor Najera participated in the first search of plaintiff by Oppenheim because they were before the grand jury. *See* Uncontroverted Material Facts 7-10.

Since Conn and Najera were before the grand jury as an advocate for the state when the first search of plaintiff occurred they are entitled to absolute prosecutorial immunity. For example, in *Gray v. Bell* 712 F.2d 490, 502 (D.C. Cir. 1983), the court held that a prosecutor is entitled to absolute immunity for conduct during and/or related to grand jury proceedings, by stating:

> "We regard it as settled that presentation of evidence to an indicting grand jury falls within the scope of *advocatory* prosecutorial conduct protected by Imbler. Participation in grand jury proceedings is a vital and customary part of a prosecutor's duties . . . We therefore hold that the trial court was fully justified in concluding that, in the instant case the presentation of evidence to the grand jury indisputably is an *advocatory* function of a prosecutor." (Emphasis added)

The Ninth Circuit has also held that a prosecutor has absolute immunity when he presents evidence to a grand jury. *see Marlowe v. Coakley* 404 F.2d 70, 70-71 (9th Cir. 1968); *see also Fine v. City of New York* 529 F.2d 70, 73 (2nd Cir. 1975). The U.S. Supreme Court has also recognized that prosecutors have absolute immunity for their conduct before a grand jury. *See Burns v. Reed supra* 111 S.Ct. at page 1941, footnote 6; *Yaselli v. Goff* 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed.2d 395 (1927).

In the case at bar, plaintiff contends that the sole and only occasion that he was allegedly prevented from giving legal advice to his client or having access to his client was when he was searched by defendant Elliott Oppenheim. Defendants Conn and Najera had no personal participation in this search, and they did not direct or supervise Oppenheim's search, because they where [sic] engaged before the grand jury when the first search occurred. Since Conn and Najera did not participate in, direct or supervise the first search they cannot be held liable for any constitutional violations caused by the first search. *See Taylor v. List* 880 F.2d 1040, 1045 (9th Cir. 1989) and *Palmer v. Sanderson* 9 F.3d 1433, 1438 (9th Cir. 1993) (doctrine of vicarious liability or respondeat superior liability is not applicable to Section 1983 claims).

Thus, as a result of Conn and Najera performing an examination of Tracy Baker before the grand jury when the first search occurred, they are now entitled to absolute prosecutorial immunity for any constitutional violations caused by the first search. *See Burns v. Reed* id. 111 S.Ct. at page 1941, footnote 6.

IV. PLAINTIFF'S CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF IS BARRED BECAUSE THERE IS NO LIKELIHOOD OF RECURRING OR THREATENED INJURY.

Equitable relief is unavailable under 42 U.S.C. Section 1983, absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged; or in otherwords, a likelihood of substantial and immediate irreparable injury. *See City of Los Angeles v. Lyons* 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton* 414 U.S. 488, 502, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974). Thus, absent a sufficient likelihood that the plaintiff will again be wronged in a similar way, a plaintiff is no more entitled to an injunction than any other citizen of Los Angeles because a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officials are unconstitutional. *See City of Los Angeles v. Lyon* id. 461 U.S. at 111; *Warth v. Seldin* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

In accord with *Lyons* is the case of *Orantes-Hernandez v. Thornburgh* 919 F. 2d 549, 557 (9th Cir. 1990),[6] where the court held that injunctive relief was inappropriate against government actions which allegedly violate the law when the injury or threat of injury is not real and immediate, but only conjectural or hypothetical. The Ninth Circuit in *Thornburgh* also held that a showing of relatively few

[6] *See also Smith v. City of Fontana* 818 F.2d 1411, 1421 (9th Cir. 1987).

instances of violations by defendants, without any showing of a deliberate policy on behalf of the named defendants, does not provide a basis for equitable relief id. at page 558.

In the present action, plaintiff's claim for injunctive and declaratory relief is based upon a single incident of alleged unconstitutional conduct that occurred on March 21, 1994. However, there is no evidence that since March 21, 1994, plaintiff has been subjected to any other searches, while a client of his was testifying before a grand jury. Furthermore, there is no evidence that plaintiff will be subjected to a search in the future, while his client testifies before a grand jury. In addition, plaintiff has no evidence of a deliberate policy by any defendant to subject attorneys to searches, pursuant to a valid warrant, while their clients are testifying before a grand jury. Therefore, unless plaintiff can produce evidence of a real and immediate threat of injury defendants are entitled to summary judgment on plaintiff's claims for Declaratory or Injunction Relief. *See Celotex v. Catrett* 477 U.S. 317, 106, S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Dated: September 1, 1995

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy County Counsel

Attorneys for Defendant
CONN AND NAJERA

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
KEVIN C. BRAZILE, Principal Deputy Co. Co.
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Attorneys for Defendant(s)
COUNTY OF LOS ANGELES, et al.,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff(s) vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendant(s)	CASE NUMBER CV 94-4227-RSWL (Ex) PROOF OF SERVICE ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On August 31, 1995, 1995 I served a true copy of:

XXXX NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT MEMORANDUM OF POINTS AND AUTHORITIES; SEPARATE

STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND AND [sic] CONCLUSIONS OF LAW; DECLARATIONS AND EXHIBITS IN SUPPORT OF MOTION

____ By personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

XXXX By depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Melissa N. Widdifield
Talcott, Lightfoot,
Vandevelde, Woehrle
& Sadowsky
655 South Hope Street,
13th Fl.
Los Angeles, Ca. 90017

Scott D. MacLatchie
Franscell, Strickland,
Roberts & Lawrence
225 S. Lake Ave. Penthouse
Pasadena, Ca. 91101

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on August 31, 1995, 1995, at Los Angeles, California.

/s/ Barbara J. Holmes
BARBARA J. HOLMES

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES, Principal Deputy County Counsel
KEVIN C. BRAZILE, Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
(213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff, vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendants.	CASE NO. CV 94-4227 RSWL (Ex) SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW (Filed Aug. 31, 1995) DATE: SEPTEMBER 25, 1995 TIME: ~~10:00~~ A.M. 9:00 COURTROOM:

TO PLAINTIFF PAUL GABBERT AND YOUR ATTORNEY OF RECORD:

Defendants David Conn and Carol Najera hereby submit the attached statement of uncontroverted material facts and conclusions of law.

Uncontroverted Material Facts

1. On March 21, 1994, plaintiff met his client, Tracy Baker at the Los Angeles Criminal Courts building at about 7:30 a.m.
   Supporting Evidence: Exhibit "3" at pages 33-34 of Transcript.

Uncontroverted Material Facts

2. On March 21, 1994, plaintiff met Tracy Baker on the 13th floor where the grand jury room is located.
   Supporting Evidence: Exhibit "3" at page 34 of transcript.

Uncontroverted Material Facts

3. Prior to Ms. Baker's testimony plaintiff knew he would not be allowed in the grand jury hearing room with her and that he had to remain outside in the waiting area.
   Supporting Evidence: Exhibit "3" at page 35 of transcript.

Uncontroverted Material Facts

4. Plaintiff checked Tracy Baker in with the grand jury bailiff at 8:30 a.m. on March 21, 1994.
   Supporting Evidence: Exhibit "3" at pages 36-37 of transcript.

Uncontroverted Material Facts

5. Tracy Baker's testimony before the grand jury began at 10:54 a.m. on March 21, 1994.
   Supporting Evidence: Exhibit "4".

Uncontroverted Material Facts

6. After Defendants Conn and Najera entered the grand jury hearing room. Tracy Baker was taken before the grand jury.
   Supporting Evidence: Exhibit "3" at pages 50-51 of transcript.

Uncontroverted Material Facts

7. Immediately after defendant Zoeller presented

plaintiff with a search warrant for his person and briefcase, Tracy Baker was called before the grand jury.
Supporting Evidence: Exhibit "3" at page 53 of transcript.

Uncontroverted Material Facts

8. Once plaintiff was presented with the search warrant he said "we'll need a private room," and then plaintiff and Oppenheim went to a private room.
Supporting Evidence: Exhibit "3" at pages 54.

Uncontroverted Material Facts

9. After being presented with the warrant, plaintiff and Oppenheim went into an office space alone.
Supporting Evidence: Exhibit "3" at pages 55-56, 61-62 of transcript.

Uncontroverted Material Facts

10. Plaintiff was only searched by Oppenheim during the first search.

Supporting Evidence: Exhibit "3" at pages 56-57, 67-68 of transcript.

Uncontroverted Material Facts

11. While plaintiff was being searched by Oppenheim he was advised that his client wanted to speak with him.
Supporting Evidence: Exhibit "3" at page 57 of transcript.

Uncontroverted Material Facts

12. The second search of plaintiff occurred after Oppenheim completed his search of plaintiff's briefcase.
Supporting Evidence: Exhibit "3" at page 69 of transcript.

Uncontroverted Material Facts

13. Defendants Conn and Najera were present when the

second search of plaintiff, by defendant Zoeller, was commenced outside of the grand jury hearing room.
Supporting Evidence: Exhibit "3" at page 70 of transcript.

Uncontroverted Material Facts

14. During the second search defendant Conn left and Najera stayed with Zoeller until Zoeller completed the search.
Supporting Evidence: Exhibit "3" at pages 70-71 of transcript.

Uncontroverted Material Facts

15. Defendant Carol Najera conducted all of the examination and questioning of Tracy Baker before the grand jury.
Supporting Evidence: Declaration of Carol Najera at paragraphs 4-7.

Uncontroverted Material Facts

16. Tracy Baker was present and outside of the grand jury hearing room when Zoeller conducted the second search.
Supporting Evidence: Exhibit "3" at pages 71-72 of transcript.

Uncontroverted Material Facts

17. The second search conducted by Zoeller on plaintiff lasted about five (5) minutes.
Supporting Evidence: Exhibit "3" at pages 71-72 of transcript.

Uncontroverted Material Facts

18. After the second search plaintiff conferred with Tracy Baker in a private room about what she was being asked in the grand jury.
Supporting Evidence: Exhibit "3" at pages 73, 107-108 of transcript.

Uncontroverted Material Facts

19. Plaintiff contends that the only occasion he didn't

have access to his client, in his mind, was when he was being searched by Oppenheim.
Supporting Evidence: Exhibit "3" at pages 76-77 of transcript.

Uncontroverted Material Facts

20. Plaintiff conferred with Tracy Baker before the contempt proceeding commenced in Dept. 110 before Judge Florence Marie Cooper.
Supporting Evidence: Exhibit "3" at page 78 of transcript.

Uncontroverted Material Facts

21. Plaintiff contends and alleges that the only time he was prevented from giving legal advice to his client on March 21, 1994 was when he was being searched by Oppenheim.
Supporting Evidence: Exhibit "3" at page 83 of transcript.

Uncontroverted Material Facts

22. Plaintiff did not sustain any loss of earnings due to the incident.
Supporting Evidence: Exhibit "3" at page 84 of transcript.

Uncontroverted Material Facts

23. Plaintiff did not sustain any medical expenses due to the incident.
Supporting Evidence: Exhibit "3" at pages 83-84 of transcript.

Uncontroverted Material Facts

24. Plaintiff never advised defendant Conn that his client (Baker) wanted to speak with him (Gabbert)
Supporting Evidence: Exhibit "3" at pages 99-100 of transcript.

Uncontroverted Material Facts

25. On March 21, 1994 while in the courthouse cafeteria and before Tracy Baker testified before the grand jury she was given legal advice by plaintiff.
Supporting Evidence: Exhibit "5" at pages 43-44 of transcript.

Uncontroverted Material Facts

26. After leaving the courthouse cafeteria Baker and plaintiff went to check in with the grand jury bailiff.
Supporting Evidence: Exhibit "5" at page 46 of transcript.

Uncontroverted Material Facts

27. While in the hallway during a 45 minute period of time before her grand jury testimony began plaintiff gave Baker legal advice.
Supporting Evidence: Exhibit "5" at page 47 of transcript.

Uncontroverted Material Facts

28. When Baker entered the grand jury hearing room defendants Conn and Najera were inside of the grand jury hearing room.
Supporting Evidence: Exhibit "5" at page 55 of transcript.

Uncontroverted Material Facts

29. After Baker was allowed to leave the grand jury room at her request, she got an indication from plaintiff that she should go back in to the grand jury and assert her fifth amendment right.
Supporting Evidence: Exhibit "5" at pages 58-59; and 61 of transcript.

Uncontroverted Material Facts

30. Tracy Baker was present and outside the grand jury room when Zoeller searched plaintiff.
Supporting Evidence: Exhibit "5" at pages 67-68 of transcript.

Uncontroverted Material Facts

31. Tracy Baker believed plaintiff would be in the waiting area while she testified before the grand jury.

Supporting Evidence: Exhibit "5" at pages 68-69 of transcript.

Uncontroverted Material Facts

32. After defendant Conn advised Baker she was going to be held in contempt she exited the grand jury hearing room where she observed Zoeller searching plaintiff.
Supporting Evidence: Exhibit "5" at pages 76, 88-89 of transcript.

Uncontroverted Material Facts

33. Tracy Baker believes Zoeller searched plaintiff for about five or ten minutes while she was present.
Supporting Evidence: Exhibit "5" at pages 87-88 of transcript.

Uncontroverted Material Facts

34. Tracy Baker believes Conn and Najera were present when Zoeller searched plaintiff.
Supporting Evidence: Exhibit "5" at pages 89 of transcript.

Uncontroverted Material Facts

35. Zoeller did not find anything he was looking for at the conclusion of his search of plaintiff.
Supporting Evidence: Exhibit "5" at page 89 of transcript.

Uncontroverted Material Facts

36. Tracy Baker knew she would be questioned about Lyle Menendez before she went before the grand jury.
Supporting Evidence: Exhibit "5" at page 95 of transcript.

Uncontroverted Material Facts

37. On March 21, 1994 the grand jury proceedings began at 10:20 a.m.
Supporting Evidence: Exhibit "2" at page 1 of transcript.

Uncontroverted Material Facts

38. On March 21, 1994 the grand jury proceeding was conducted for investigative purposes only and not an indictment.
Supporting Evidence: Exhibit "2" at pages 2-9 of transcript.

Uncontroverted Material Facts

39. On March 21, 1994, Leslie Zoeller was the first person to testify before the grand Jury.
Supporting Evidence: Exhibit "2" at page 11 of transcript.

Uncontroverted Material Facts

40. Tracy Baker was called to testify before the grand jury after Leslie Zoeller.
Supporting Evidence: Exhibit "2" at page 24 of transcript.

Uncontroverted Material Facts

41. Tracy Baker was questioned before the grand jury by Carol Najera.
Supporting Evidence: Exhibit "2" at page 24 of transcript.

Uncontroverted Material Facts

42. When Tracy Baker was asked before the grand jury whether she was acquainted with Lyle Menendez she asked for permission to confer with her attorney for a moment.
Supporting Evidence: Exhibit "2" at page 25 of transcript.

Uncontroverted Material Facts

43. Pursuant to her request Tracy Baker was allowed to leave the grand jury room to confer with her attorney.
Supporting Evidence: Exhibit "2" at page 25 of transcript.

Uncontroverted Material Facts

44. When Tracy Baker was recalled before the grand jury and again was asked if she was acquainted with Lyle Menendez, on the advice of counsel she asserted her fifth amendment privilege.
Supporting Evidence: Exhibit "2" at page 26 of transcript.

Uncontroverted Material Facts

45. When Ms. Baker was asked did she know Lyle Menendez in August, 1989, she again asked to confer with counsel and her request was granted and she exited the grand jury.
Supporting Evidence: Exhibit "2" at pages 26-27 of transcript.

Uncontroverted Material Facts

46. When Tracy Baker was asked a second time, if she knew Lyle Menendez in August of 1989, she once again, based on the advice of counsel, asserted her fifth amendment rights.
Supporting Evidence: Exhibit "2" at page 27 of transcript.

Uncontroverted Material Facts

47. When Tracy Baker was asked if she brought the documents called for in the subpoena she again asked to confer with her attorney.
Supporting Evidence: Exhibit "2" at page 27 of transcript.

Uncontroverted Material Facts

48. After Tracy Baker's request to confer with her attorney regarding the subpoena, the grand jury recessed so that a contempt hearing could be held in Dept. 110 before Judge Florence Marie Cooper.
Supporting Evidence: Exhibit "2" at pages 27-31 of transcript.

Uncontroverted Material Facts

49. Plaintiff attended and represented his client at the contempt proceeding in Department 110.
Supporting Evidence: Exhibit "2" at page 36 of transcript.

Uncontroverted Material Facts

50. Tracy Baker's grand jury testimony was completed at 11:12 a.m.
Supporting Evidence: Exhibit "4".

Uncontroverted Material Facts

51. The contempt proceeding commenced at 11:40 a.m.
Supporting Evidence: Exhibit "2" at page 33 of transcript.

Uncontroverted Material Facts

52. Defendants Conn and Najera did not refuse any of Tracy Baker's requests to confer with her attorney.
Supporting Evidence: Declaration of Conn at paragraph 8 and Najera at paragraph 8.

Uncontroverted Material Facts

53. Defendants Conn and Najera did not prevent Tracy Baker from conferring with her attorney.
Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Uncontroverted Material Facts

54. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff.
Supporting Evidence: Declaration of Conn at paragraphs 4-7 and Najera at paragraphs 4-7.

Uncontroverted Material Facts

55. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff.
Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Uncontroverted Material Facts

56. Defendants Conn and Najera did not deny plaintiff access to his client.
Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Uncontroverted Material Facts

57. Defendants Conn and Najera did not prevent plaintiff from conferring with his client.
Supporting Evidence: Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Conclusion of Law

1. A prosecutor is entitled to qualified immunity when his conduct does not violate clearly established law. *Romero v. Kitsap County* 931 F.2d 624 (9th Cir. 1991).

2. A prosecutor is entitled to qualified immunity even if he mistakenly violates clearly established law when his conduct is objectively reasonable under preexisting law. *See Romero v. Kitsap County* id.

3. Plaintiff bears the burden of proof on establishing whether the law is clearly established. *See Romero v. Kitsap County* id.

4. A prosecutor is entitled to absolute immunity for conduct intimately associated with judicial phase of the criminal process. *See Imbler v. Pachtman* 424 U.S. 409 (1976).

5. A prosecutor is entitled to absolute immunity for conduct occurring during or related to grand jury proceedings. *See Gray v. Bell* 712 F.2d 490 (D.C. Cir. 1983); *Marlowe v. Coakley* 404 F.2d 70 (9th Cir. 1968).

6. The doctrine of vicarious liability does not apply to section 1983 claims. *See Palmer v. Sanderson* 9 F.3d 1433 (9th Cir. 1994).

7. Proximate cause is an essential element of a Section 1983 action. *See Arnold v. I.B.M.* 637 F.2d 1350 (9th Cir. 1981).

Dated: August 28, 1995

IT IS SO ORDERED.
DATED _____

_____
UNITED STATES
DISTRICT JUDGE

DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendant
CONN and NAJERA

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
KEVIN C. BRAZILE, Principal Deputy Co. Co.
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Attorneys for Defendant(s)
COUNTY OF LOS ANGELES, et al.,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT, Plaintiff(s) vs. DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER and DOES 1 through X. Defendant(s)	CASE NUMBER CV 94-4227-RSWL (Ex) PROOF OF SERVICE ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On August 31, 1995, 1995 I served a true copy of:

XXXX SEPARATE JUDGMENT OF UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW

____ By personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

XXXX By depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Melissa N. Widdifield
Talcott, Lightfoot,
Vandevelde, Woehrle
& Sadowsky
655 South Hope Street,
13th Fl.
Los Angeles, Ca. 90017

Scott D. MacLatchie
Franscell, Strickland,
Roberts & Lawrence
225 S. Lake Ave. Penthouse
Pasadena, Ca. 91101

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on August 31, 1995, 1995, at Los Angeles, California.

/s/ Barbara J. Holmes
BARBARA J. HOLMES